

# Indiana Law Review



Volume 17 No. 4 1984

## Notes

**Right to Refuse Antipsychotic Medication: A Proposal for Legislative Consideration**

**The Constitutionality of Roadblocks Conducted to Detect Drunk Drivers in Indiana**

**Prejudgment Interest for Personal Injury Litigants: A Summons for Indiana Lawmakers**

**Taking Roe to the Limits: Treating Viable Feticide as Murder**

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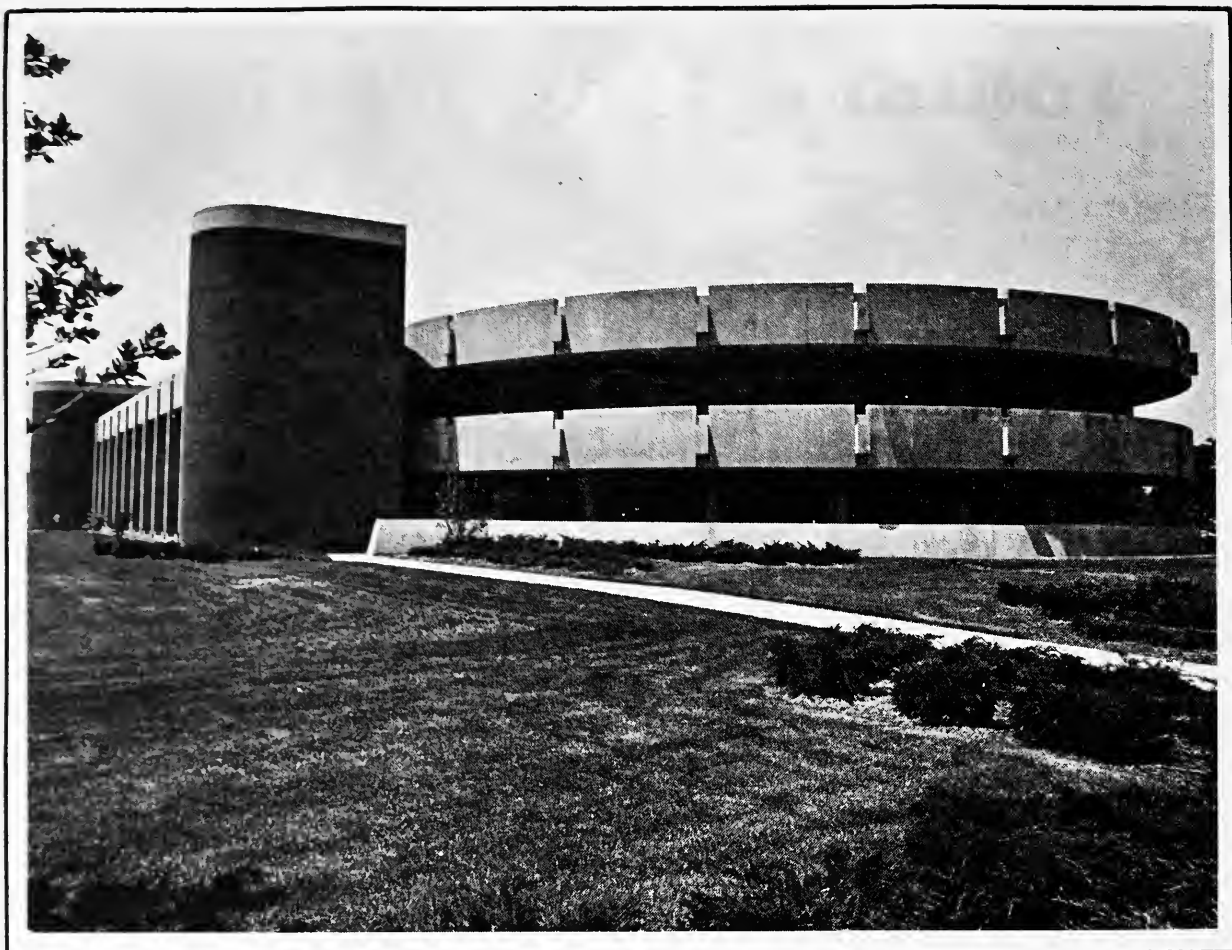
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## Right to Refuse Antipsychotic Medication: A Proposal for Legislative Consideration

### I. INTRODUCTION

One of the most divisive issues confronting psychiatry and law today is whether or not involuntarily confined mental patients in state institutions have a right to refuse treatment with powerful antipsychotic drugs. Open hostility has developed between medical professionals attempting to provide institutional care and legal professionals representing patients who assert individual rights.<sup>1</sup> Because of recent court decisions which have held that the involuntarily committed mentally ill have a qualified constitutional right to refuse antipsychotic medication,<sup>2</sup> this issue is now an immediate concern for states. These recent decisions illustrate judicial schizophrenia regarding the basic issue of what constitutional analysis to apply in defining a right to refuse treatment, and also indicate judicial discord in defining the scope of such a right.

Antipsychotic medication<sup>3</sup> is widely accepted and commonly used in mental institutions.<sup>4</sup> These drugs are effective in altering patients' moods, behavior, and thoughts. Critics dispute the drugs' effectiveness and claim that they are used primarily to control behavior.<sup>5</sup> In the current state

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<sup>1</sup>See, e.g., Dix, *Realism and Drug Refusal: A Reply to Applebaum and Gutheil*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 180 (1981).

<sup>2</sup>See *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (motion for preliminary injunction), 476 F. Supp. 1294 (D.N.J. 1979), *modified and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 102 S. Ct. 3506 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

<sup>3</sup>See *infra* note 19 and accompanying text.

<sup>4</sup>See *infra* note 20 and accompanying text.

<sup>5</sup>See *infra* notes 22-23 and accompanying text. The district court in *Rennie v. Klein*, 476 F. Supp. 1294 (D.N.J. 1979), cited a study by Dr. George Crane which concluded that psychotropic drugs are widely prescribed by hospital staff doctors to solve problems in managing patients. *Id.* at 1299 (quoting Crane, *Clinical Psychopharmacology in Its 20th Year*, 181 Science 124, 125 (1973)). The district court also observed that state hospitals for the mentally ill were understaffed, and that patients had trouble seeing a psychiatrist. 476 F. Supp. at 1299. In a previous decision, the same court found that doctors in state mental

mental institutions.<sup>4</sup> These drugs are effective in altering patients' moods, behavior, and thoughts. Critics dispute the drugs' effectiveness and claim that they are used primarily to control behavior.<sup>5</sup> In the current state mental health system, where care is often provided by an insufficient number of poorly trained and overwhelmed staff, the inappropriate and extensive use of involuntary medication is a threatening reality to mental patients.<sup>6</sup> All researchers agree that these antipsychotic drugs have serious and potentially permanent side effects.<sup>7</sup>

Some patients, faced with institutional drug abuse and its debilitating side effects, have objected to antipsychotic medication and have sought to establish in court their rights to refuse treatment. Yet, legal challenges raised on common law theories such as informed consent have generally been unsuccessful, because the institutionalized mentally ill traditionally are excluded from such protections.<sup>8</sup> Likewise, state statutory remedies are often either nonexistent or vague and applied with uncertainty.<sup>9</sup>

Challenges based on constitutional principles which protect individuals from unwarranted government interference are proving more successful. Recently, two federal appellate courts have expressly recognized a qualified constitutional right to refuse antipsychotic medication.<sup>10</sup> Unfortunately, these courts have been imprecise in defining the standards and procedures a state must follow if it seeks to override such a refusal. Although the

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health facilities did not have sufficient time for each patient. 462 F. Supp. 1131, 1136 (D.N.J. 1978).

As a result of conditions like those found by the New Jersey district court, drugs are often given by untrained staff in improper dosages for extended periods of time and are used in combinations with other drugs. 476 F. Supp. at 1300-03 (inadequate diagnosis, administration, and monitoring of drug treatment described). See *In re Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981). In *Roe*, the court noted that other courts "have identified abuses of antipsychotic medication by those claiming to act in an incompetent's best interests." *Id.* at \_\_\_\_ n.\_\_\_\_, 421 N.E.2d at 53 n.11. See also Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461, 463-64 (1977) (Mental hospitals that are understaffed, overcrowded, and underfinanced can lead to questionable practices in drug prescription and treatment.).

<sup>4</sup>476 F. Supp. at 1299.

<sup>5</sup>See *infra* notes 34-43 and accompanying text.

<sup>6</sup>Although many courts will discuss the common law doctrine of informed consent, most cases hold that a mental patient's right to refuse antipsychotic drug treatment is based on constitutional grounds. See, e.g., *Davis v. Hubbard*, 506 F. Supp. 915, 929 (N.D. Ohio 1980) (holding based on fourteenth amendment); *In re K.K.B.*, 609 P.2d 747, 751 (Okla. 1980) (holding based on constitutional right to privacy).

<sup>7</sup>See *infra* notes 74-77 and accompanying text.

<sup>10</sup>*Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980); *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (motion for preliminary injunction), 476 F. Supp. 1294 (D.N.J. 1979), *modified and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 102 S. Ct. 3506 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

courts agree that states, through their police powers, have an inherent ability to protect the lives and well-being of their citizens and can forcibly administer medication to patients in an "emergency," courts disagree on a definition of "emergency."<sup>11</sup> Additionally, courts do not agree on the scope of the states' *parens patriae*<sup>12</sup> power to care for those who cannot care for themselves. The United States Supreme Court has demanded that any remedy for forcible administration of antipsychotic drugs should be sought through the state.<sup>13</sup> Therefore, whether or not a patient may refuse antipsychotic drugs depends solely upon the jurisdiction in which the right is asserted, and most states have not addressed this issue.<sup>14</sup>

As more states are faced with the overwhelming evidence of institutional abuse of antipsychotic medication and as an increasing number of courts are confronted with the intense controversy in this developing constitutional law area, the need for useful procedures designed to protect patients' rights will become critical. This Note offers a legislative proposal creating guidelines for protecting the rights of the involuntarily committed mental patient to refuse forcible administration of antipsychotic drugs.<sup>15</sup> The second section of the Note examines the traditional absence of common law and state law remedies for those complaining of forced medication in state hospitals. This section will also trace the development of a federal right to refuse such medication. The third section turns to the proposed guidelines for legislative consideration. The system established by the United States District Court for New Jersey in *Rennie v. Klein*<sup>16</sup> provides the framework for this proposal. The proposal adds several modifications to increase its adaptability and use.

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<sup>11</sup>See *infra* note 81.

<sup>12</sup>The state may intercede as *parens patriae* to provide for persons under actual or legal incapacity. Under this power, the state provides for the adjudication of incompetence, the appointment of a guardian, and the treatment of a patient in the absence of consent. See, e.g., *Winters v. Miller*, 446 F.2d 65, 70-71 (2d Cir. 1971). See also *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980). The court determined that the state may impose antipsychotic drugs on patients through its *parens patriae* power, but only if the patient is incapable of deciding for himself. *Id.* at 935.

<sup>13</sup>*Mills v. Rogers*, 457 U.S. 291 (1982).

<sup>14</sup>See *infra* notes 72-78 and accompanying text.

<sup>15</sup>This Note and its proposal is limited to adults who are involuntarily committed to state mental hospitals. Minors present special problems beyond the scope of this Note. Likewise, the "voluntary" patient who theoretically may refuse any medication and who may leave the hospital at will is not included in this work. Studies indicate, however, that many of these "voluntary" patients are coerced into treatment, unaware of their rights to leave the hospital and are as much confined as prisoners. See, e.g., *Emery v. State*, 26 Utah 2d 1, 4, 483 P.2d 1296, 1298 (1971).

<sup>16</sup>462 F. Supp. 1131, 1148 (D.N.J. 1978) (motion for preliminary injunction), 476 F. Supp. 1294 (D.N.J. 1979), *modified and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 102 S. Ct. 3506 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

## II. Recognizing a Right

### A. Realities of the Current System

In the 1950's, with the discovery of a "remarkable" class of antipsychotic drugs,<sup>17</sup> psychiatry began a new era in the treatment of psychosis, the most severe of mental disorders.<sup>18</sup> Active treatment with these tranquilizing drugs effectively alters mental patients' moods, behavior, and thought processes.<sup>19</sup> The use of these drugs has become the predominant form of treatment. Studies indicate that nearly every patient in some state hospitals receive regular administration of these drugs.<sup>20</sup>

Antipsychotic drugs are most commonly used in treating patients diagnosed as schizophrenics.<sup>21</sup> The drugs, by influencing chemical transmissions in the brain, sedate the schizophrenic and suppress psychotic

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<sup>17</sup>See Cole & Davis, *Antipsychotic Drugs*, 2 A. FREEMAN & H. KAPLAN, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY II, 1921 (2d ed. 1975); Crane, *Clinical Psychopharmacology in Its 20th Year*, 181 Science 124 (1973).

<sup>18</sup>AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). Psychosis is a severe mental disorder that is characterized by a generalized failure of functioning. There are two major categories of psychoses: Those associated with organic brain disorders (brain injury or brain disease), and those not attributable to physical conditions. The latter category is further divided into three groups: The schizophrenias, characterized by disorders of thought; the major affective disorders, characterized by disturbances of mood; and the paranoid states, characterized by a system of delusions. *Id.*

<sup>19</sup>Antipsychotic drugs, also called neuroleptics or major tranquilizers, are a subclass of psychotropic drugs—drugs for the treatment of psychiatric problems. Antipsychotics include several chemical compounds. The four major groups of compounds used in the treatment of schizophrenia are the rauwolfia derivatives, the phenothiazine derivatives, the butyrophenones, and the thioxanthene derivatives. Better known trade names of antipsychotics used in the United States are: Thorazine (brand of chlorpromazine), Halidol (brand of haloperidol), Prolixin (brand of fluphenazine), and Navane (brand of thiothexene). Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Rights to Refuse Treatment*, 72 Nw. U.L. Rev. 461, 474 n.77 (1977). See also C. Kornetsky, PHARMACOLOGY: DRUGS AFFECTING BEHAVIOR 81-101 (1976). In general, the drugs affect both the activitory and inhibitory chemical transmissions to the brain. Because the drugs' purposes are to reduce the level of psychotic thinking, it is virtually undisputed that they are mind altering. *Id.*

<sup>20</sup>See Mason, Nerviano & DeBurger, *Patterns of Antipsychotic Drug Use in Four Southeastern State Hospitals*, 38 DISEASES OF THE NERVOUS SYSTEM 541 (1977). A study of drug administration concluded that in four state hospitals more than 93% of the patients were receiving antipsychotic medication. *Id.* at 541.

<sup>21</sup>Schizophrenia is a condition characterized by thought disorders that may be accompanied by delusions, hallucinations, attention deficits, and bizarre motor activity. The DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 18, names thought disorders as the predominant symptom. Clinicians generally try to classify schizophrenia into four types according to predominant symptoms: simple schizophrenia (characterized by apathy and withdrawal from social interaction but without bizarre symptoms), hebephrenic schizophrenia (most severe disintegration of personality characterized by hallucinations, delusions, and fantasy), catatonic schizophrenia (characterized by either excessive motor activity or by a mute, stuporous state), paranoid schizophrenia (characterized by delusions of persecution, grandeur, or both).

symptoms such as delusions, hallucinations, and other disorders.<sup>22</sup> Often, treatment with antipsychotic drugs leads to a shortened period of confinement,<sup>23</sup> especially if the schizophrenia is acute.<sup>24</sup> However, antipsychotic drugs do not cure mental illness, and patients generally relapse when removed from the medication.<sup>25</sup> Additionally, the drugs' effectiveness in aiding chronic schizophrenia<sup>26</sup> is clearly disputed; some schizophrenics never improve and others deteriorate.<sup>27</sup>

Unfortunately, antipsychotic drugs are prescribed not only to those diagnosed as schizophrenic, but also to those misdiagnosed as suffering from the illness.<sup>28</sup> Misdiagnosis may be as high as fifty percent.<sup>29</sup> Current diagnostic approaches are imperfect and imprecise, even when used by the most qualified psychiatrists.<sup>30</sup> Additionally, society provides disincentives for those persons working in mental institutions, which results in the employment of less than the most qualified psychiatrists. "Many, if not most, of the medical staff of state mental hospitals turn out to be

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<sup>22</sup>See Byck, *Drugs and the Treatment of Psychiatric Disorders*, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 152 (L. Goodman & A. Gilman, eds. 1975). One authority noted that a single dose of chlorpromazine will cause the subject to experience a fall in blood pressure, increased heart rate, a decrease in respiratory rate, decreased salivary secretion, constriction of the pupils, and decreased motor activities. *Id.* at 152-200. See also L. Hollister, CLINICAL USE OF PSYCHOTHERAPEUTIC DRUGS (1973).

<sup>23</sup>See C. Kornetsky, PHARMACOLOGY: DRUGS AFFECTING BEHAVIOR 81-101 (1976).

<sup>24</sup>The court in *Rennie v. Klein*, 476 F. Supp. 1294, noted that "[t]he drugs are most useful in diffusing schizophrenic thought patterns during acute psychotic episodes." *Id.* at 1298 (citations omitted).

<sup>25</sup>Comment, *Madness & Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497, 539 (1980) (citing Kinross-Wright & Charalompous, *A Controlled Study of a Very Long-Acting Phenothiazine Preparation*, 1 INT'L J. NEUROPSYCH. 66 (1965). See also Comment, *supra*, at 539 n.26 (citing Rothstein, *An Evaluation of the Effects of Discontinuation of Chlorpromazine in Chronic Patients*, 23 DISORDERS OF THE NERVOUS Sys. 522 (1962)).

<sup>26</sup>Schizophrenia is considered chronic if the psychotic patient has deteriorated over a long period of time, or if the patient has been hospitalized for more than two years. Davidson & Hearle, ABNORMAL PSYCHOLOGY 582 (1974).

<sup>27</sup>See, e.g., Davis, *Recent Developments in the Drug Treatment of Schizophrenia*, 133 AM J. PSYCHIATRY 208 (1976).

<sup>28</sup>See Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973). The author described an experiment that involved twelve normal "pseudopatients" who were admitted to a state mental institution. Eleven of these pseudopatients were diagnosed as schizophrenic and one as manic-depressive. *Id.* at 258 n.10. The researcher concluded that the mental hospital poses a special environment where the meaning of behavior can be misinterpreted. *Id.* at 257.

<sup>29</sup>See Pope & Lipinski, *Diagnosis in Schizophrenia and Manic-Depressive Illness: A Reassessment of the Specificity of "Schizophrenic" Symptoms in the Light of Current Research*, 35 ARCH. GEN. PSYCHIATRY 811 (1978) (describing unreliability in diagnosis).

<sup>30</sup>For a review of studies concerning the reliability and validity of psychiatric evaluations, see Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 699-732 (1974).

poorly trained in comparison with psychiatrists from other settings."<sup>31</sup> The institutional setting is one of overworked staff and insufficient resources, and care of the mentally ill has evolved into a system of inexpensive, convenient, and involuntary care. The court in *Davis v. Hubbard*,<sup>32</sup> for example, described the situation:

[T]he testimony at trial established that the prevalent use of psychotropic drugs is countertherapeutic and can be justified only for reasons other than treatment—namely, for the convenience of the staff and for punishment. . . .

Psychotropic drugs are . . . freely prescribed . . . by both licensed and unlicensed physicians [who] . . . regularly prescribe drugs . . . without regard to whether he is personally assigned to the patient or whether he has even seen the patient. It is not unusual for attendants to recommend a certain dosage or increased dosage. . . . Further, when dealing with an especially disturbed patient, attendants can obtain additional medication by submitting appropriate forms to the pharmacy when there is no physician available.<sup>33</sup>

Not only are patients faced with the prevalent misuse of the potent antipsychotic drugs, but patients often must cope with inappropriate drug prescriptions. Even the most qualified of clinicians have encountered great difficulty in deciding which of the drugs to prescribe for particular schizophrenics.<sup>34</sup> Each drug's action upon certain symptoms is frequently unpredictable.<sup>35</sup> According to several investigators, "Drugs are chosen by custom and rumored repute, and dosage is commonly adjusted upward until the patient either responds or develops toxic symptoms; alternatively, a fixed dosage is used, based on previous experience or local practice."<sup>36</sup>

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<sup>31</sup>Langley, *Viewpoint: A Commentary By APA's President*, 60 PSYCHIATRIC NEWS 22 (1980). See 2 *Drugs in Institutions: Hearings Before the Subcommittee To Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). Nearly 50% of the psychiatrists in state institutions are graduates of foreign medical schools. These psychiatrists are seldom licensed to practice in the state and few of them are fluent in English. *Id.* at 171. See also Knesper & Hirtle, *Strategies to Attract Psychiatrists to State Mental Hospital Work*, 38 ARCH. GEN. PSYCHIATRY 1135 (1981). In 1980, the number of psychiatrists in state mental institutions in 32 of 50 states averaged two per 100 inpatients. *Id.* at 1135.

<sup>32</sup>506 F. Supp. 915, 926 (N.D. Ohio 1980).

<sup>33</sup>*Id.* at 926-27 (footnote and citations omitted).

<sup>34</sup>Properly prescribed antipsychotic drugs produce only temporary symptomatic relief in those patients accurately diagnosed. However, an accurate diagnosis is rare and proper prescription of the drug is even more uncertain. See *Rennie v. Klein*, 462 F. Supp. 1131, 1139-40.

<sup>35</sup>462 F. Supp. at 1139-40.

<sup>36</sup>May, Van Putten, Yale, Potepan, Jenden, Fairchild, Goldstein & Dixon, *Predicting Individual Responses to Drug Treatment in Schizophrenia: A Test Dose Model*, 162 J. NERVOUS & MENTAL DISEASE 177, 178 (1976).

Unfortunately, the "toxic" side effects that accompany use of antipsychotic drugs are many. "All the antipsychotic drugs induce a variety of disorders of the central nervous system as side effects."<sup>37</sup> The patient may experience increased heart rate, congestion, jaundice, skin reactions, vision impairment, changes in cellular composition of the blood, parkinsonism, loss of libido, loss of secretion of certain hormones, and allergic reactions.<sup>38</sup> The most serious among these side effects is tardive dyskinesia, a potentially irreversible brain disorder. It is "characterized by rhythmical, repetitive, involuntary movements of the tongue, face, mouth, or jaw, sometimes accompanied by other bizarre muscular activity."<sup>39</sup> Tardive dyskinesia is not limited to patients who have been treated with antipsychotic drugs for long periods of time; the effects can appear within weeks.<sup>40</sup> Moreover, up to one-half of all long term hospitalized schizophrenics may be affected by the disorder.<sup>41</sup> Although side effects tend to diminish when treatment is stopped, tardive dyskinesia has no known cure, and is generally not discovered until its grotesque manifestations become seriously disabling.<sup>42</sup>

Generally, drug therapy with antipsychotics is the treatment of diseases of unknown causes by drugs of unknown consequences. Despite the uncertain benefits and the certain risks, antipsychotic medication continues to be the chief form of treatment for involuntarily confined mental patients.<sup>43</sup> Yet, while the dangers of overmedication and improper ap-

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<sup>37</sup>Rennie v. Klein, 653 F.2d 836, 843 (3rd Cir. 1981) (citing Plotkin, *supra* note 5, at 474-78).

<sup>38</sup>653 F.2d at 843-44. Many studies indicate a wide variety of effects ranging from simple dry mouth to death. *Id.* It is beyond the scope of this Note to catalogue all the possible side effects. See C. Kornetsky, PHARMACOLOGY: DRUGS AFFECTING BEHAVIOR 81-101 (1976).

<sup>39</sup>Rennie v. Klein, 462 F. Supp. at 1138 (citations omitted) (possible link between psychotropic drugs and suicidal depression). Tardive dyskinesia usually causes the muscles to produce continual involuntary chewing and lip motions and facial contractions, thereby subjecting the victims to severe embarrassment. Davis v. Hubbard, 506 F. Supp. 915, 929 (N.D. Ohio 1980).

<sup>40</sup>See Burke, Fahn, Jankovic, Marsden, Lang, Gollomp & Ilson, *Tardive Dystonia: Late-Onset and Persistent Dystonia Caused by Antipsychotic Drugs*, 32 NEUROLOGY 1335 (1982). This study consisted of 42 patients who developed a type of tardive dyskinesia with two months of treatment. *Id.* at 1335.

<sup>41</sup>That such a staggering percentage of hospitalized schizophrenics may be affected was established by medical testimony in *Rennie v. Klein*, 476 F. Supp. 1294, 1300 (1979). See also Rogers v. Okin, 478 F. Supp. 1342, 1360 (D. Mass. 1980) (Two studies placed the prevalence of tardive dyskinesia among schizophrenics at 50% and 56%, with an outpatient prevalence rate of 41%).

<sup>42</sup>Comment, *supra* note 25, at 533 n.163. See Davis v. Hubbard, 506 F. Supp. 915, 929 (N.D. Ohio 1980); Rennie v. Klein, 476 F. Supp. 1294, 1300 (D.N.J. 1979), *modified and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 102 S. Ct. 3506 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

<sup>43</sup>See *supra* note 42. See also Chandler & Child, (CAL. STATE ASSEMBLY OFFICE OF RESEARCH, THE USE & MISUSE OF PSYCHIATRIC DRUGS IN CALIFORNIA MENTAL HEALTH PROGRAMS), (1977).

plication lead to patient protest, patients commonly refuse such treatment to no avail.<sup>44</sup>

### B. *An Absence of Remedies?*

Confronted with the alarming degree of institutional abuse of antipsychotic medication, patients have turned to the courts for help.<sup>45</sup> An involuntarily confined mental patient may attempt to assert a legal right to refuse treatment through common law, statutory law, and constitutional provisions. Historically, however, these have proved to be inadequate tools in prescribing limitations upon state mental health systems.

1. *Common Law*.—Under common law, any unauthorized touching constitutes a battery,<sup>46</sup> even if that touching takes place for the purpose of rendering medical care.<sup>47</sup> Thus, physicians operate under the obligation to obtain the patient's consent before proceeding with treatment. This doctrine of informed consent,<sup>48</sup> as well as the common law tort of battery,<sup>49</sup> zealously guards "sane" persons from unwanted medical treatment. In contrast, involuntarily confined mental patients often have been excluded from the protections afforded by the doctrine of informed consent.<sup>50</sup> For them, a recovery based upon battery for forcible medication is not attained,<sup>51</sup> because courts hold that traditional torts are inapplicable to the forced medication of the mentally ill.<sup>52</sup> Similarly, medical malpractice

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<sup>44</sup>See Rachlin, *One Right Too Many*, 3 BULL. AM. ACAD. PSYCHIATRY & L. 99 (1975). "The usual practice is to give medication intramuscularly to those patients who do not cooperate with the oral route . . . [The patients are] physically restrained, pants removed, injected with antipsychotic drugs through a hypodermic needle . . . at times in full view of other patients or staff." *Id.* at 101. See also *Mills v. Rogers*, 457 U.S. 291, (1982).

<sup>45</sup>See *infra* notes 50-53.

<sup>46</sup>See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 18, at 101-06 (4th ed. 1971).

<sup>47</sup>*Id.*

<sup>48</sup>The doctrine of informed consent reflects that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). See also *In re Brook's Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (N.Y. Sup. Ct. 1962).

<sup>49</sup>See W. PROSSER, *supra* note 46, § 10, at 37. See also *Pratt v. Davis*, 118 Ill. App. 161 (1905), *aff'd*, 224 Ill. 300, 79 N.E. 562 (1906); *Woodbridge v. Worcester St. Hosp.*, 384 Mass. 38, 423 N.E.2d 782 (1981) (court denied tort action).

<sup>50</sup>See, e.g., *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (1976).

<sup>51</sup>See, e.g., *Lojuk v. Quandt*, 706 F.2d 1456, 1467 (7th Cir. 1983) (affirming dismissal of battery action brought by schizophrenic patient who was subjected to electric shock therapy without his consent); *Rogers v. Okin*, 478 F. Supp. 1342, 1383 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650, 663 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Cox v. Hecker*, 218 F. Supp. 749 (E.D. Pa. 1963), *aff'd*, 330 F.2d 958 (3d Cir. 1964), *cert. denied*, 379 U.S. 823 (1964).

<sup>52</sup>See, e.g., *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983); *Rogers v. Okin*, 478 F. Supp. 1342, 1383 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650, 663 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982).

actions for forcible medication have been unsuccessful.<sup>53</sup>

Nevertheless, careful analysis demonstrates that little support exists for the broad proposition that psychiatric treatment of the mentally ill cannot be remedied using common law principles.<sup>54</sup> Informed consent is found to exist when three conditions are met: The physician makes a reasonable disclosure to the patient of the treatment risks; a voluntary decision concerning treatment is made by the patient; and, the patient is competent to make such a decision.<sup>55</sup> The disclosure requirement theoretically poses little problem in situations involving mental patients.<sup>56</sup> Although empirical studies cast doubt on a patient's ability to assimilate information provided by the physician and to use this information in reaching a decision regarding treatment, these problems are no less prevalent in the "sane" world.<sup>57</sup> Furthermore, most courts reject the argument that voluntariness poses any substantial problem for the mental patient.<sup>58</sup>

The required element of competency to make informed decisions has traditionally represented a significant obstacle in applying the doctrine of informed consent to the involuntarily confined mental patient.<sup>59</sup> Before a patient can be involuntarily committed, a court must determine that he suffers the requisite degree of mental illness.<sup>60</sup> Despite the fact that these involuntary commitment proceedings are extremely brief,<sup>61</sup> courts

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<sup>53</sup>See, e.g., *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982).

<sup>54</sup>See generally Note, *A Common Law Remedy for Forcible Medication of the Institutionally Mentally Ill*, 82 COLUM. L. REV. 1720 (1982).

<sup>55</sup>See generally W. PROSSER, *supra* note 46, § 18, at 104-05; Waltz & Scheuneman, *Informed Consent to Therapy*, 64 NW. U.L. REV. 628 (1970).

<sup>56</sup>See, e.g., *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (requiring disclosure of all risks, benefits and alternative treatments that a "reasonable patient" would require to make a well-informed decision). Most commentators recommend that psychiatrists comply with the *Canterbury* standard. See Mills, Hsu & Berger, *Informed Consent: Psychiatric Patients and Research*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 119-32 (1980).

<sup>57</sup>See Grundner, *On the Readability of Surgical Consent Forms*, 302 N. ENG. J. MED. 900, 901-02 (1980).

<sup>58</sup>Often, people in mental hospitals make few important decisions and are eager to please physicians and staff. See generally E. GOFFMAN, *ASYLUMS* (1961). This suggests that these patients are particularly susceptible to coercion, force, and duress. Nevertheless, most courts reject suggestions that institutionalized patients cannot give voluntary consent. See, e.g., *Kaimowitz v. Michigan Dep't of Mental Health*, No. 73-19434-AW, slip op. at 21 (Cir. Ct., Wayne County, Mich. July 10, 1973), excerpted in 2 PRISON L. REP. 433, 476 (1973) (court noting that the law has long recognized that a patient, institutionalized or not, can give valid consent).

<sup>59</sup>A single test for incompetency does not seem to exist. The usual presumption, in law and in medicine, is that an adult is considered competent until proven incompetent. Roth, Meisel & Lidz, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCH. 279, 282 (1977).

<sup>60</sup>Procedures for involuntary commitment are prescribed by state statute.

<sup>61</sup>See, e.g., *Kendall v. True*, 391 F. Supp. 413, 415 (W.D. Ky. 1975) (average length of a commitment hearing is six minutes).

and psychiatrists have historically held the view that the commitment decision ipso facto resulted in an incompetency determination.<sup>62</sup> However, as the science of psychiatry develops and as the attitude toward the mentally ill becomes more realistic, the body of applicable law should also change to reflect the realities of general mental illness versus total mental incompetence.<sup>63</sup> The assumption that a patient who was committed by the courts is also incompetent to make decisions concerning his treatment is not necessarily correct.<sup>64</sup> At a commitment hearing, the only issue decided is whether the patient is dangerous or substantially unable to care for himself.<sup>65</sup> These patients presumptively retain all other civil rights. The United States Supreme Court has determined that in a hospital setting the patient must be incapable of making a competent decision concerning treatment before the state's *parens patriae* power can be exerted and drugs forcibly administered.<sup>66</sup> Additionally, most state statutes attempt to distinguish grounds for commitment from incompetency.<sup>67</sup> Recent court decisions recognize that mental illness and commitment do not presumptively imply incompetence and an inability to participate in treatment decisions.<sup>68</sup> Likewise, psychiatric authorities agree that there is not necessarily any relationship between commitment and the ability to make

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<sup>62</sup>See, e.g., *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (1976) (holding that the state needs to assume the decisionmaking role for one presumptively unable to do so rationally for himself). This merger of deciding incompetency with the commitment determination may, in part, be a result of the imprecise terminology used in most civil commitment statutes. Words such as "insane," "lunatic," and "crazy" foster the notion that a mentally ill person is totally incapable of rational thought. See Plotkin, *supra* note 5, at 483.

<sup>63</sup>See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

<sup>64</sup>See, e.g., JOINT INFORMATION SERVICE OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE NATIONAL ASSOCIATION FOR MENTAL HEALTH, *PSYCHIATRIC POINTS OF VIEW REGARDING LAWS AND PROCEDURES GOVERNING MEDICAL TREATMENT OF THE MENTALLY ILL* 232, 237.

<sup>65</sup>See, e.g., *Colyar v. Third Dist. Ct. for Salt Lake County*, 469 F. Supp. 424 (D.C. Utah 1979) (Utah's statute requiring that commitment necessarily meant incompetence was found overly broad and impermissibly vague); *Bay v. Board of Registrars of Voters of Belchertown*, 368 Mass. 631, 332 N.E.2d 629 (1975) (finding commitment is not intended to involve a determination of competency).

<sup>66</sup>*Addington v. Texas*, 441 U.S. 418, 426-27 (1979). Under its *parens patriae* power, a state may order psychiatric treatment of a patient in the absence of consent. *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971).

<sup>67</sup>Several states expressly distinguish civil commitment and legal incompetency. E.g., ALASKA STAT. § 47.30.070 (1) (Supp. 1983); ARIZ. REV. STAT. ANN. § 36-506(A) (1979) (Supp. 1975-83); FLA. STAT. § 393.12 (Supp. 1974-83); IDAHO CODE § 66-346(a) (Supp. 1984); IND. CODE § 16-14-1.6-4 (Supp. 1984); KAN. STAT. ANN. § 59-2930 (Supp. 1984).

<sup>68</sup>See *Lojuk v. Quandt*, 706 F.2d 1456 (7th Cir. 1983), *cert. denied*, 404 U.S. 985 (1972); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650, 663 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982). But see *A.E. and R.R. v. Mitchell*, No. C-78-466 (D. Utah 1980) (summarized in 5 MEN. DIS. L. REP. 154 (1981)) (court determined all committed persons were incompetent to make decisions).

rational decisions.<sup>69</sup> For the sake of efficiency and economy,<sup>70</sup> however, hospital regulations rarely discriminate between legally competent and incompetent patients, and presume that all involuntarily committed patients are incapable of consenting to treatment.<sup>71</sup>

Undoubtedly, the application of the common law doctrine of informed consent to the treatment of the involuntary mental patient requires the court to carefully balance the interests of both the state and the individual. In the balance, most courts have been reluctant to allow recovery involving the committed patient's right to refuse antipsychotic drugs.<sup>72</sup> Courts generally apply the doctrine to the private relationship between the doctor and the patient and are understandably reluctant to employ the doctrine in limiting the state's power over mental patients. Thus, courts look to statutory or constitutional remedies as a source of relief for mental patients expressing a right to refuse antipsychotic medication.

2. *State Statutes.*—Mental patients, in their search for a legal right to refuse drug treatments, are also foreclosed from the legal protections derived from statutes. State statutes are "a patchwork of inconsistencies and omissions,"<sup>73</sup> and judicial interpretations of these statutes also tend to be inconsistent. More specifically, a state mental patient's statutory right to refuse treatment with antipsychotic drugs is generally non-existent.<sup>74</sup> Some states do allow a patient to refuse medication, unless the attending physician determines such refusal would result in a deterioration of the patient's condition.<sup>75</sup> Given the bias of the medical attendant and the strained environment of the state institution,<sup>76</sup> even these statutes have the practical effect of offering the involuntary patient

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<sup>69</sup>See *supra* note 64, at 237 ("It must be clearly understood that the establishment of a mental illness does not, ipso facto, warrant a finding of incompetency. . . . From a medical point of view there is not, necessarily, any connection between the two."). Thus, hospitalized mental patients have been permitted to engage in business transactions, write checks, file income tax returns, and conduct other independent matters typically recognized to require competence.

<sup>70</sup>See *supra* text accompanying note 5.

<sup>71</sup>It would be more logical to presume that the involuntary patient is capable of consenting to treatment unless the court has made an individual determination to the contract. See *infra* note 121.

<sup>72</sup>See, e.g., *Davis v. Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980).

<sup>73</sup>Plotkin, *supra* note 5, at 498.

<sup>74</sup>See, e.g., CONN. GEN. STAT. ANN. § 17-206d(b) (West Supp. 1983-84) ("Involuntary patients may receive medication and treatment without their consent. . . ."); IND. CODE §16-14-1.6-7 (Supp. 1979) (absent a petition to the court, involuntary patients have no right to refuse treatment). Several state statutes ignore procedures necessary for drug administration or refusal by involuntary patients. E.g., Alabama, Arkansas, Hawaii, Maine, and West Virginia.

At least one state specifically allows the involuntary mental patient to refuse "chemotherapy." IOWA CODE ANN. §229.23(2) (West Supp. 1983).

<sup>75</sup>See, e.g., FLA. STAT. §393.13(3)(F) (Supp. 1974-83); GA. CODE §88.502.6(b) (Supp. 1982).

<sup>76</sup>See *supra* notes 5-6 and accompanying text.

no right to refuse. Several statutes do require procedural safeguards, such as informed consent, before certain "unusual" treatments may be used.<sup>77</sup> These statutes are typically vague, however, and their application to antipsychotic drug treatment is uncertain. Absent specific statutory grants of a right to refuse treatment with antipsychotic medication, courts have declined to find such a right.<sup>78</sup> Thus, mental patients are left with little control over the form their treatment will take.

Without applicable common law rights or consistent statutory rights, these patients presently can look only to the Constitution. Yet even at its most protective state, a constitutional right to refuse drugs, without supportive state statutes, proves limited in its effect. While the United States Constitution may define the minimum protections for patient autonomy, effective protection of a liberty interest results from supporting a recognized intertwining of the constitutional right with state law protections.<sup>79</sup>

3. *Constitutional Law.*—Confronted with evidence of the widespread institutional abuse of antipsychotic medication and with the absence of common law remedies for forced medication or state laws granting a right to refuse medication, federal courts recently have expressly recognized a constitutional right to refuse drugs.<sup>80</sup> Unfortunately, these courts have reached widely divergent conclusions on the scope of that right and on the specific procedures a state must follow if it seeks to override a refusal to submit to certain treatments.<sup>81</sup> Additionally, these courts disagree on the standards to be applied when protecting the patient's right.<sup>82</sup> Although courts concur that the state's inherent power to protect the

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<sup>77</sup>See, e.g., CONN. GEN. STAT. §17-206(d) (Supp. 1983) (safeguards for psychosurgery or ECT by substituted consent); DEL. CODE ANN. §16-5161 (Supp. 1982) (safeguards for experimental drugs or procedures); FLA. STAT. §393.13(3)(F)(1) (Supp. 1974-83) (no unnecessary or excessive medication); MONT. CODE ANN. §53-21-148 (1981) (safeguards for unusual or hazardous treatment procedures).

<sup>78</sup>See *In re B*, 156 N.J. Super. 231, 383 A.2d 760 (1977) (finding forced administration of antipsychotic drugs possible because these drugs were not listed as "intrusive drugs" in the statute); see also *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905 (1976).

<sup>79</sup>See *infra* notes 133-35 and accompanying text.

<sup>80</sup>Early courts and commentators disagreed on the constitutional theory involved in a right to refuse medication. See, e.g., *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976); (possible violation of first, eighth, or fourteenth amendments); *Knecht v. Gellman*, 488 F.2d 1136, 1139 (8th Cir. 1973) (eighth amendment); *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). For a discussion comparing the different constitutional bases for a right to refuse antipsychotic medication see Cort, *Judicial Schizophrenia: An Involuntarily Confined Mental Patient's Right to Refuse Antipsychotic Drugs*, 51 UMKC L. REV. 74, 83 (1982).

<sup>81</sup>*Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980); *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) (motion for preliminary injunction), 476 F. Supp. 1294 (D.N.J. 1979), *modified and remanded*, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 102 S. Ct. 3506 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983). The remaining text of this section will discuss these differences in detail.

<sup>82</sup>See *supra* note 81 and accompanying text.

well-being of its citizens can be invoked to justify forcible medication in an emergency, courts inconsistently define "emergency."<sup>83</sup> Neither is there agreement on the scope of the state's *parens patriae* powers to care for those who cannot care for themselves.<sup>84</sup> Nevertheless, these recent cases have established a qualified constitutional right to refuse administration of antipsychotic drugs, and this right may well be recognized by other courts.

In *Rennie v. Klein*,<sup>85</sup> mental patients bringing suit under the Civil Rights Act<sup>86</sup> challenged the practice of forcible medication in New Jersey mental hospitals. The United States District Court for New Jersey concluded that involuntarily committed patients have a substantive constitutional right to refuse medication,<sup>87</sup> and it announced a three-step procedure to ensure due process when the state seeks to override a refusal. First, the treating physician must inform the patient about his condition, his need for a particular drug, his right to refuse the drug, the risks or benefits of the drug, and other alternative treatments. Second, if written, informed consent is not obtained, the institution must refer the matter to an independent "Patient Advocate."<sup>88</sup> Third, independent psychiatrists must conduct an informal hearing and issue a written opinion.<sup>89</sup> For patients found incompetent by the court, the same procedures must be followed with the aid of a court-appointed guardian.<sup>90</sup>

The district court pointed out that, in New Jersey, commitment alone does not include a finding of incompetency; thus, an involuntarily confined patient must be presumed competent absent a contrary formal finding.<sup>91</sup> From this, the court found that even though some drug refusal is prompted by irrational components of psychosis, refusals can be predicated on a "quite rational desire to avoid unpleasant side effects and a realistic appraisal that the medication is not helping one's condition."<sup>92</sup>

In analyzing the constitutional issues, the court found the right to refuse medication to be included under the evolving constitutional right to privacy.<sup>93</sup> This right was considered broad enough to protect one's

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<sup>83</sup>See *supra* note 81 and accompanying text.

<sup>84</sup>See *supra* note 81 and accompanying text.

<sup>85</sup>476 F. Supp. 1294 (D.N.J. 1979), 462 F. Supp. 1131 (D.N.J. 1978).

<sup>86</sup>42 U.S.C. §1983 (1981). This act prohibits government officials from interfering with the civil rights of citizens.

<sup>87</sup>462 F. Supp. at 1145.

<sup>88</sup>476 F. Supp. at 1313-15. Patient advocates would be directly appointed, supervised, and paid by the central state agency, not by the mental hospital, and would be "trained attorneys, psychologists, social workers, registered nurses or paralegals." *Id.* at 1313.

<sup>89</sup>*Id.* at 1314-15.

<sup>90</sup>*Id.* at 1314.

<sup>91</sup>462 F. Supp. at 1145.

<sup>92</sup>476 F. Supp. at 1305.

<sup>93</sup>462 F. Supp. at 1143-44. The court found no violation of the eighth amendment prohibition against cruel and unusual punishment nor of the first amendment right of freedom of expression. *Id.* at 1143-44.

mental processes from government interference, and could only be overridden in emergencies or when the state can show a "strong countervailing interest."<sup>94</sup> The court defined an emergency as "a sudden, significant change in the patient's condition which creates danger to the patient himself or to others in the hospital."<sup>95</sup> In such an emergency, the patient could be forcibly medicated. In the absence of an emergency, but when the attending physician believes medication is necessary for the treatment, the state may exercise its *parens patriae* powers.<sup>96</sup>

On appeal, the Third Circuit Court of Appeals modified and remanded the district court's preliminary rulings.<sup>97</sup> The appeals court held that in a nonemergency situation, the forcible administration of antipsychotic drugs to involuntarily committed mental patients who have never been adjudicated incompetent must be the least restrictive means of treatment in order to be constitutional.<sup>98</sup> Nevertheless, the court stated that due process does not require a prior adversary hearing before an independent decision maker for each patient. The court found that it is sufficient that the regulations adopted by New Jersey are followed. These regulations require that, except in emergencies, the patient first be informed of his condition, of the need for a drug, of its possible effects and of his right to refuse.<sup>99</sup> If the patient refuses, then he is allowed to participate in a discussion by a treatment team concerning recommended medication.<sup>100</sup> Finally, if the treatment team affirms the necessity of the medication, the matter is referred to the medical director of the institution. If the director agrees, the patient's refusal is overridden.<sup>101</sup>

The court of appeals based its finding of a limited right to refuse medication on the due process clause of the fourteenth amendment rather than the right to privacy.<sup>102</sup>

Although the United States Supreme Court granted certiorari for *Rennie v. Klein*,<sup>103</sup> the Court vacated the Third Circuit's decision and remanded the case for reconsideration in light of the recent Supreme Court decision in *Youngberg v. Romeo*.<sup>104</sup> The *Romeo* decision, in the

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<sup>94</sup>*Id.* at 1144.

<sup>95</sup>476 F. Supp. at 1313.

<sup>96</sup>*Id.* at 1314.

<sup>97</sup>653 F.2d 836, 852 (3d Cir. 1981) (en banc), *vacated and remanded*, 102 S. Ct. 3506 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983).

<sup>98</sup>653 F.2d at 845.

<sup>99</sup>*Id.* at 848-49.

<sup>100</sup>653 F.2d 836.

<sup>101</sup>*Id.* at 849.

<sup>102</sup>653 F.2d at 843, 844.

<sup>103</sup>457 U.S. 291 (1982).

<sup>104</sup>102 S. Ct. 2452 (1982). The United States Supreme Court, in a single stroke and without receiving briefs or hearing arguments on the case, remanded the *Rennie* case back to the Third Circuit Court of Appeals for reconsideration in light of *Romeo*. 102 S. Ct. 3506 (1982). Despite the Court's reluctance to face the issue of the scope of a right to refuse treatment, the majority in *Romeo* was willing to go further than it ever had before. Justice Powell's decision recognized liberty interests protected by the due process clause of

context of an institution for the mentally retarded, stated that restrictions on patients' liberties for therapy could not be considered constitutional violations unless the professional judgment was so poor as to represent a deviation from the usual standard of care.<sup>105</sup> The Supreme Court thus declined to adopt, although it did not reject, a "least intrusive means" analysis as the sole standard for a mental patient's right to refuse treatment.<sup>106</sup>

In its reconsideration of *Rennie* in light of the Supreme Court's opinion in *Romeo*, the Third Circuit was called upon to determine whether or not the Supreme Court intended the professional judgment standard to be the sole basis in a decision to administer medication against the protests of an involuntarily committed mentally ill patient.<sup>107</sup> Only three of the ten judges joined in determining that the professional judgment standard is a standard separate and distinct from the least intrusive means test.<sup>108</sup> These judges, in an opinion written by Circuit Judge Garth, read into the Supreme Court's remand an implicit disapproval of the least intrusive means test in circumstances involving the involuntarily committed mentally ill. Thus, Judge Garth concluded, although "involuntarily committed mentally ill patients have a constitutional right to refuse administration of antipsychotic drugs," the "decision to administer such drugs against the patient's will must be based on accepted professional judgment and [the] procedures specified in New Jersey Administrative Bulletin 78-3 satisfied due process requirements in such regard."<sup>109</sup>

The seven other judges comprising the Third Circuit panel did not detect such a narrow message from the Supreme Court.<sup>110</sup> These judges, in three different concurring opinions and in one dissent, strongly articulated concerns for the welfare of the patient and of society as requiring a consideration of possible alternatives and the use of drugs and incorporation of the least restrictive alternative test as a part of the professional judgment standard.<sup>111</sup>

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the fourteenth amendment, a right to personal security and a right to freedom from bodily restraint. 102 S. Ct. at 2462.

<sup>105</sup>102 S. Ct. at 2462. In order to recover damages, "the decision by the professional [must be] such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* (footnote omitted).

<sup>106</sup>See *infra* notes 154-56 and accompanying text.

<sup>107</sup>*Rennie v. Klein*, 720 F.2d 266 (3d Cir. 1983).

<sup>108</sup>Circuit Judge Garth was joined by Circuit Judges Aldisert and Hunter.

<sup>109</sup>720 F.2d 266, 267 (This quoted material is found in the reporter's summary; it is not part of the court's official opinion.).

<sup>110</sup>Chief Judge Seitz was joined here by Circuit Judges Adams, Weis, Higginbotham, Sloviter, Becker, and Gibbons.

<sup>111</sup>*Rennie v. Klein*, 720 F.2d 266, 270-77. Judge Adams concluded that the operative meaning of "professional judgment" is amorphous and most definitely necessitates a consideration of alternative choices in treatment. *Id.* at 271-72. Judges Becker and Seitz found that a decision to administer drugs is fact sensitive and requires a consideration of harmful side effects and alternatives to drugs. *Id.* at 273-74. Judges Weis, Higginbotham,

Ultimately, six of these seven judges concurred with Judge Garth's opinion; however, the concurrences were premised entirely on the fact that any professional decision to override a mental patient's refusal of medication must follow procedures specified in the New Jersey Administrative Bulletin 78-3. Significantly, the procedures within the Bulletin include considerations of the least intrusive alternatives.

The second federal court to find a constitutional right to refuse forcible medication was the First Circuit Court of Appeals in *Rogers v. Okin*.<sup>112</sup> In *Rogers*, patients challenged medication practices in a Massachusetts state hospital. The district court concluded that there is a constitutional right to refuse medication which can only be overridden in an emergency and not for purposes of treatment under the *parens patriae* powers.<sup>113</sup> The court defined emergency in terms of a substantial likelihood of physical harm to self or others.<sup>114</sup> For nonemergency circumstances, the district court imposed a requirement of informed consent.<sup>115</sup>

On appeal to the First Circuit, the district court's order was modified slightly.<sup>116</sup> The appellate court expanded the definition of emergency to include a balancing by physicians of relevant interests, including the necessity for immediate medical response in order to prevent or decrease the likelihood of a deterioration of the patient's clinical condition.<sup>117</sup> Also, the court remanded the case "for consideration of alternative means for making incompetency determinations in situations where any delay could result in significant deterioration of the patient's mental health".<sup>118</sup> Evidently, the court was calling for practical flexibility in determining incompetency.

The United States Supreme Court granted certiorari in *Rogers*;<sup>119</sup> but while the case was pending, a significant decision was rendered by the highest court of Massachusetts.<sup>120</sup> Because of this decision, the Supreme Court refused to decide the precise question of the right of an involuntary mental patient to refuse antipsychotic medication.<sup>121</sup> The Supreme Court noted that both the substantive and the procedural aspects of such a

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and Sloviter regretted the retreat of the court from advancements in applying the least intrusive means test and found that the Supreme Court had no intention of preventing the use of such a test. *Id.* at 274-76. Circuit Judge Gibbons dissented in an opinion expressing a need for even stronger protections for a mental patient's right to refuse treatment. *Id.* at 277 (referring to *Rennie v. Klein*, 653 F.2d 836, 865-70 (3d Cir. 1981)).

<sup>112</sup>478 F. Supp. 1342 (D. Mass. 1979).

<sup>113</sup>*Id.* at 1369. The court used the right to privacy as its constitutional basis.

<sup>114</sup>*Id.* at 1365, 1369.

<sup>115</sup>*Id.* at 1367-68.

<sup>116</sup>634 F.2d 650 (1st Cir. 1980).

<sup>117</sup>*Id.* at 656-67.

<sup>118</sup>*Id.* at 660.

<sup>119</sup>*Mills v. Rogers*, 457 U.S. 291 (1982).

<sup>120</sup>*In re Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981).

<sup>121</sup>*Mills v. Rogers*, 457 U.S. 291 (1982).

right were intertwined with state law,<sup>122</sup> and remanded the case to the lower court for reconsideration in light of *In re Guardianship of Roe*.<sup>123</sup>

In *Roe*, a father was appointed as guardian for his noninstitutionalized incompetent son.<sup>124</sup> The father sought authority to consent to the forcible administration of antipsychotic drugs for his son. The Supreme Judicial Court of Massachusetts denied the father's request, holding that except in an emergency, the "substituted judgment" of an incompetent must be exercised by a judge, not a guardian, in cases of forced medication.<sup>125</sup> Only an overwhelming state interest would suffice in allowing forced medication.<sup>126</sup> Although the Massachusetts court emphasized that its holding was limited to noninstitutionalized incompetents, the United States Supreme Court found the case applicable in *Rogers*.<sup>127</sup> The *Roe* case indicated that the state might recognize liberty interests of a broader scope than those recognized by federal law, thus requiring greater procedural due process protection than the minimum required by the Constitution to protect federal rights.<sup>128</sup> The Supreme Court's decision in *Rogers* suggested that the Court may not use the *Romeo* standard (requiring unusual deviation from standard professional judgment in decisions to treat institutionalized patients forcibly) in cases involving the rights of mental patients. Nevertheless, the remand leaves uncertain both the scope of the federal right to refuse antipsychotic medication and the standards to be used by state mental institutions in order to protect this right.

As the Supreme Court suggested in *Rogers*,<sup>129</sup> the federal right to refuse treatment is a question with both substantive and procedural aspects. The substantive issue involves identification of the conditions under which competing state interests might outweigh the constitutionally recognized liberty interest in avoiding unwanted administration of drugs. The cases reveal no general agreement on the criteria that must be applied to determine whether refusals may be overridden. On the most fundamental level, disagreement exists as to whether, in nonemergency situations, a determination of incompetency is always necessary. The *Rogers* court suggested it is necessary.<sup>130</sup> However, *Rennie* holds that a patient's

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<sup>122</sup>*In re Guardianship of Roe*, 383 Mass. 415, \_\_\_\_, 421 N.E.2d 40, 50 (1982). The *Roe* decision indicated that a state might recognize liberty interests of a broader scope than those recognized under federal law, thus requiring greater procedural due process protection than the minimum required by the United State Constitution to protect the individual's federal rights. *Id.* at \_\_\_\_, 421 N.E.2d at 51.

<sup>123</sup>*Id.*

<sup>124</sup>*In re Guardianship of Roe*, 383 Mass. 415, 421 N.E.2d 40 (1981).

<sup>125</sup>*Id.*

<sup>126</sup>*Id.*

<sup>127</sup>457 U.S. at 301.

<sup>128</sup>*Id.*

<sup>129</sup>*See id.* (1982). This suggests that if the state law provides a substantive right, this right will receive federal procedural due process protection.

<sup>130</sup>*Id.*

risk of harm to self or others may be sufficient.<sup>131</sup> In addition, the courts disagree as to the definition of an emergency situation; some courts hold that an emergency includes the threat of deterioration of the patient if he refuses drugs.<sup>132</sup>

The procedural issue concerns the standards required for determining when a patient's liberty interest actually is outweighed in a particular instance. While the Constitution defines the minimum, the true protections of due process are dependent upon the more extensive liberty interests recognized by state law.<sup>133</sup> Therefore, a right to refuse that will be accompanied by adequate procedural safeguards must be derived from the states. Presently, the states that have adopted legislative protections for a right to refuse medication are in the minority.<sup>134</sup> As this constitutional area develops<sup>135</sup> and more federal courts address the rights of the mental patient, legislatures will seek to construct guidelines to protect these rights.<sup>136</sup>

### III. Proposal for Legislative Consideration

#### A. Introduction

The growing concern for defining and protecting involuntarily committed patients' rights for drug refusal demands alternatives to the present chaos in this area. The essence of the current proposal is to provide involuntarily committed mental patients with procedural protections for a qualified right to refuse forcible administration of antipsychotic drugs.<sup>137</sup> Federal courts in both *Rennie* and *Rogers* provided that a mentally ill individual, despite involuntary commitment, is still competent to parti-

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<sup>131</sup>*Rennie v. Klein*, 476 F. Supp. 1294 (D.N.J. 1979).

<sup>132</sup>*Rogers v. Okin*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982).

<sup>133</sup>*See Mills v. Rogers*, 457 U.S. 291 (1982).

<sup>134</sup>*See infra* note 136.

<sup>135</sup>Recently, the court in *In re Anderson v. State*, 135 Ariz. App. 578, 663 P.2d 570 (1982), concluded that Arizona law and due process require considerably more than the minimum requirements of the federal Constitution, and that the procedures presently utilized in the Arizona State Hospital to deal with involuntarily committed mental patients refusing medication were deficient as a matter of law. This recent decision was made in light of *Rogers* and strongly suggests that states will take a new look at statutory construction in dealing with patient refusal of forced medication. *See People ex rel. Medina*, \_\_\_\_ Colo. App. \_\_\_\_, 662 P.2d 184 (1982). In reviewing the recent federal court decisions of *Rogers* and *Rennie*, the court determined that a mentally incompetent patient may decline drug treatment. The court looked to the state statute to provide guidelines in protecting the interests of this patient in light of a fourth amendment right to refuse treatment. *Id.* at \_\_\_\_, 662 P.2d at 186. *See also Clites v. State*, 322 N.W.2d 917 (Iowa Ct. App. 1982) (recognizing a violation of industry standards by hospital in light of *Rennie* and *Rogers*).

<sup>136</sup>Several states have adopted a right to refuse antipsychotic medication. *E.g.*, N.J. STAT. ANN. §30:4-24.2(d)(1) (West 1981); 50 PA. STAT. ANN. §7203 (Purdon Supp. 1982).

<sup>137</sup>The procedures outlined by the district court in *Rennie v. Klein*, 476 F. Supp. 1294, provide the framework for this proposal, with many modifications and alterations.

cipate in his own treatment decisions and has a constitutional right to do so.<sup>138</sup> Only in the event that this mentally ill patient has also been adjudged incompetent or when an emergency situation exists may the state's *parens patriae* power override the patient's own treatment refusal.<sup>139</sup> Therefore, a basic assumption of this proposal is that the mentally ill usually can and should make their own treatment decisions. Also, each case should be handled independently and directly rather than through the substituted judgment of a court-appointed guardian.

The proposal, to be effective, must appeal to both the mental health and the legal systems. The psychiatrist who wishes to provide the best possible medical care is caught in a quandry when an involuntarily committed patient refuses treatment. The physician faces an ethical conflict of either providing quality medical care against the patient's wishes or giving what he might believe is inadequate care consistent with the patient's demands. The lawyer, in protecting the constitutional rights of his client, the patient, must insist upon procedural protections which are often expensive and lengthy. Meanwhile, the patient is caught in a treatment limbo. This proposal addresses these concerns in its provisions.

### B. Proposed Statute

#### Section 1. General Purposes of the Act

- (a) All individuals have a fundamental right to make informed decisions about treatment with antipsychotic medication.
- (b) This Act is designed to:
  - (1) Ensure the right of a competent individual to refuse treatment with antipsychotic medication;
  - (2) Reduce the risk that an involuntarily committed individual will receive antipsychotic drug treatment that will not serve his best interests; and
  - (3) Provide procedural safeguards to protect a right to refuse medication, the benefits of which are not outweighed by administrative costs.
- (c) This Act shall be construed to protect the fundamental right of the individuals to make treatment choices.

The primary objective of legislative action in the area of drug refusal will be to protect the patient's fundamental right to make choices about

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<sup>138</sup>See *supra* note 81 and accompanying text.

<sup>139</sup>*Id.* The courts suggest that a determination of incompetency necessitates a separate adjudication from that of commitment. See *supra* note 68 and accompanying text. A large number of state statutes are consistent with this opinion. See *supra* note 67 and accompanying text. Also, recent case decisions are consistent with this. See, e.g., *Anderson v. State*, 135 Ariz. App. 578, 663 P.2d 570 (1982) (an involuntary mental patient who has not been adjudged incompetent could not be subjected to forced medication with antipsychotic drugs); *People ex rel. Medina*, \_\_\_\_ Colo. App. \_\_\_\_, 662 P.2d 184 (1982) (finding that even when an incompetent patient refuses treatment with drugs, the drugs cannot be forced without a court hearing).

his treatment. Necessarily, legislatures will be concerned with the expense of any proposal. This proposal anticipates constitutional development in the area of a right to refuse treatment with antipsychotic medication;<sup>140</sup> and, when constitutional rights are involved, costs may become secondary. However, this proposal recognizes that a truly practical regulatory provision cannot be extremely expensive to implement nor involve burdensome administrative requirements. Patient interests are better protected when useful legislation is not impeded by excessive complexities.

## Section 2. Definitions

As used in this Act:

- (a) "Involuntary patient" refers to an individual admitted to a hospital under a judicial certificate.
- (b) "Antipsychotic medication" refers to a class of psychotropic drugs used in the treatment of schizophrenic symptoms.
- (c) "State hospital" refers to public hospitals for care, treatment, training, and detection of persons who are mentally ill and supervised by State Department of Mental Health.
- (d) "Psychiatrist" refers to a medical doctor who has completed the required psychiatric residency.
- (e) "Patient advocate" refers to a person with such a degree or experience that the individual can be termed a psychologist, psychiatrist, medical doctor, attorney, registered nurse, or social worker.
- (f) A patient has the "competency" to make informed decisions to refuse treatment with antipsychotic medication if either:
  - (1) The patient has been committed without being adjudicated incompetent; or
  - (2) The patient, despite an incompetency adjudication
    - (a) evidences a choice in treatment and
    - (b) evidences that this choice is based on rational reasons and outcomes.
- (g) "Informed consent" refers to consent based on:
  - (1) An understanding of the nature, consequences, and possible side effects of the drug,
  - (2) An understanding of possible alternatives, and
  - (3) A decision formed voluntarily under conditions free from duress.
- (h) "Emergency" refers to a situation in which the life of the patient is in immediate danger or the life or well-being of others is in danger due to the symptomatic behavior of the patient. This definition does not require an imminent danger of physical deterioration to the patient himself.

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<sup>140</sup>See *supra* notes 2, 133 and accompanying text.

- (i) "Medical director" refers to the highest medical administrator of the state hospital.

Commitment to a mental hospital does not in and of itself imply that the patient is incompetent to make decisions about treatment.<sup>141</sup> A patient should be considered incompetent only if he is adjudicated incompetent by a court. This may require a second proceeding or, ideally, may be treated as a second issue at the commitment hearing. It is imperative, however, that a separate determination be made. The court, in authorizing appropriate treatment or in considering competency to refuse treatment, could consider: (1) the intrusiveness of the treatment by weighing the irreversibility, side effects, and efficiency of the drug, and (2) the availability of any less restrictive alternatives based on psychiatric testimony.<sup>142</sup>

The degree to which a patient needs to be competent in order to participate in his treatment decisions is not adequately defined at law. Some patients have no desire to participate in treatment decisions; others exhibit hallucinations or delusions that cloud their capacity to make competent decisions. These factors would be considered in a competency hearing.<sup>143</sup> In the event that an involuntarily committed patient who has also been adjudicated incompetent expresses a desire to refuse medication, due process procedures would be triggered.<sup>144</sup>

The definition of any emergency situation that would allow medical personnel to medicate refusing patients forcibly has been the subject of much disagreement among courts.<sup>145</sup> This proposal suggests that the accepted definition of emergency requires that there be an immediate risk of serious danger to the patient or substantial risk of danger to the life or well being of others because of the patient's uncontrolled symptomatic behavior. This broad definition might be more realistically enforced in a typical hospital setting than would a narrow definition. The word "immediate" is included in the definition, however, to lessen the possibility that medication would be forcibly administered at the slightest indication of difficulty.

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<sup>141</sup>The district court in *Rogers v. Okin*, 478 F. Supp. at 1361, concluded that most involuntarily committed mental patients, although somewhat impaired in their relationship to reality, can perceive the benefits, risks, and discomfort resulting from treatment. *Id.* See *supra* notes 65-67 and accompanying text.

<sup>142</sup>Courts have recognized the need for such weighing of interests. See *In re Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (establishing factors for a court to consider in weighing whether a patient would want to be treated). See also *Position Statement on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded*, 134 AM. J. PSYCHIATRY 354-55 (1977).

<sup>143</sup>See Roth & Meisel, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCHIATRY 279-84 (1977) (refusal based on a delusion, such as a belief the drug is poison, is not based on competent decisionmaking and probably will not be allowed).

<sup>144</sup>See Section 5 of legislative proposal for a discussion of due process requirements.

<sup>145</sup>See *supra* notes 129-36 and accompanying text.

The court in *Rennie v. Klein*<sup>146</sup> required a "sudden significant change" in its definition of emergency. Such a restriction does not seem workable because some patients may enter the hospital with violent behavior that is threatening to self or others. Thus, the hospital staff might have difficulty determining that this is a "sudden" and "significant" change in behavior.

The court in *Rogers v. Okin*<sup>147</sup> included in its definition of emergency a situation in which treatment is necessary to prevent "significant deterioration of the patient's mental health."<sup>148</sup> The present proposal eliminates this provision in its definition. Such a vague provision could easily lend itself to abuse. Also, a right to refuse treatment, if it is to be a complete right, includes the right to refuse treatment, even that deemed beneficial.

### Section 3: Informed Consent

- (a) An involuntarily committed patient in a state hospital may not be given antipsychotic medication unless:
  - (1) The patient has signed a consent form for the particular drug; or
  - (2) An emergency is deemed to exist, and the physician, consistent with the professional judgment standard, has determined the drug to be the least restrictive alternative, as defined in Section 4.
- (b) Informed consent shall be obtained through the following procedures:
  - (1) A licensed physician shall discuss with the patient, in language the patient can understand:
    - (a) the expected benefits of the proposed drug;
    - (b) the proposed drug's nature, degree, duration, and probability of side effects and significant risks commonly known by the medical profession, including any possibility of irreversibility of the side effect;
    - (c) the availability of reasonable alternative treatments and why the physician recommends a particular treatment;
    - (d) that the patient has a right to accept or refuse the proposed drug and that if he consents, he has the right to revoke that consent for any reason at any time prior to or between treatments.
  - (2) The patient shall sign a written consent form which shall include:
    - (a) a description of the treatment to which he has consented;

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<sup>146</sup>*Rennie v. Klein*, 476 F. Supp. at 1313.

<sup>147</sup>*Rogers v. Okin*, 634 F.2d at 660 (1st Cir. 1980).

<sup>148</sup>*Id.*

- (b) a description of the purposes, benefits, risks, and possible consequences of the drug use;
  - (c) a statement of the right to refuse the drug;
  - (d) a notice that the patient has a right to retract his present consent to treatment;
  - (e) a statement of the right of the patient to have an advocate assist him in possible review hearings.
- (3) Written, informed consent is deemed given when the patient, without duress or coercion, clearly and explicitly manifests consent to drug treatment on the standard consent form.
- (a) the physician may urge the proposed drug as the best one, but may not use, in an effort to gain consent, any reward or threat, express or implied, nor any form of inducement or coercion. No one shall be denied any benefits for refusing treatment;
  - (b) a person shall not be deemed incapable of refusal solely by virtue of being diagnosed as mentally ill or abnormal;
  - (c) written consent shall be given only after twenty-four (24) hours have elapsed from the time the information described in subsection (l) has been given.

Although written consent forms for the administration of drugs have not been the traditional practice in the medical profession, this requirement will help ensure that the involuntarily committed state hospital patient has been contacted and informed of his treatment plan.<sup>149</sup> State hospitals are typically overcrowded and understaffed.<sup>150</sup> Patients in such a setting have been carelessly prescribed drugs, yet have little or no recourse.<sup>151</sup> Studies reveal that few state hospital patients can even identify the medication they take.<sup>152</sup> Consent forms will inevitably raise the knowledge of the patients concerning their drug therapy, thereby increasing patient competency to make decisions concerning such treatment.

This proposal suggests that patients be given the right to withdraw their consent once it is given. It makes no difference whether this retraction is oral or written. Once the patient has withdrawn his consent, however, a new consent form would need to be signed in order to administer the drug.

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<sup>149</sup>A recent study by Geller, *State Hospital Patients and their Medication—Do They Know What They Take?*, 139 AM. J. PSYCHIATRY 5 (1982), found that 54% of mental hospital patients demonstrated no understanding of the medication they were regularly taking, and only 8% could indicate a name and intended effect of at least one medication they were taking. This research suggests that the majority of patients are not being informed of their drug treatment, and, in turn, are not giving informed consent. See also CAL. WELF. & INST. CODE §5326.2 to .5 (West Supp. 1974-83) (providing a very detailed informed consent procedure for all treatment in general).

<sup>150</sup>See *supra* notes 31-32 and accompanying text.

<sup>151</sup>See *supra* notes 23-32 and accompanying text.

#### Section 4: Forcible Administration of Antipsychotic Drugs

- (a) Antipsychotic drugs may be forcibly administered in an emergency situation.
- (b) Procedures include:
  - (1) An emergency shall be declared to exist only by a licensed physician.
  - (2) Antipsychotic drugs shall be administered only if the physician, using standard professional judgment, determines that no other less intrusive alternative is available.
  - (3) Only a licensed physician will administer the drug.
  - (4) Emergency administration with antipsychotic medication may be given for up to one week. A longer period will require a review hearing, as provided in Section
  - (5) Any drug used must be the least intrusive option possible under the circumstances.
  - (6) At any time an emergency is declared, the physician shall make a written report of such situation and of his action.

In order to reduce the possibility of abuse of the emergency exception to forcible drug administration, only a licensed physician may declare a situation an emergency.<sup>153</sup> Even in an emergency, antipsychotic drugs should not be given until the physician determines that no less intrusive alternative treatment exists.<sup>154</sup> This determination includes a requirement for a consideration of any prior experience the patient has had with antipsychotic medication. If the patient has experienced severe side effects, the physician should vigorously explore treatment alternatives.<sup>155</sup> In order for application of a less intrusive alternative to be practical, discretion should be left with the attending physician subject to an analysis of whether the physician's treatment substantially departed from standard professional judgment in light of the requirement of choosing the less intrusive alternative.<sup>156</sup>

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<sup>152</sup>See *supra* note 149 and accompanying text.

<sup>153</sup>See Section 2 of the legislative proposal for a definition of an emergency situation.

<sup>154</sup>In *Vitex v. Jones*, 445 U.S. 480 (1980), the United States Supreme Court required that even when justifying the use of drugs under the *parens patriae* theory, the use must always be the least intrusive infringement since, with the use of powerful drugs, there is always the danger that the results of the medication may be worse than the illness. See also *People ex rel. Medina*, \_\_\_\_ Colo. App. \_\_\_\_, 662 P.2d 184, 186 (1982) (emphasizing the use of the least intrusive means).

The Third Circuit in *Rennie v. Klein*, 720 F.2d 266, held that the Supreme Court remand in *Rennie* indicated that physicians will be held to a professional judgment standard in their administration of antipsychotic drugs. The majority of judges concluded, however, that the least intrusive means test is necessarily a part of the professional judgment standard, and that any professional decision to override a mental patient's refusal of medication must follow procedures specified in a state bulletin which expressly included considerations of the least intrusive alternative. See *supra* notes 107-11 and accompanying text.

<sup>155</sup>Consideration of the least intrusive means is consistent with the observation of the court in *Rogers*, 478 F. Supp. at 1365.

<sup>156</sup>For an excellent discussion of the less restrictive alternative see, Comment, *The*

### Section 5: Internal Review Hearing

- (a) An internal review hearing, conducted by a medical director, is required when an involuntarily committed patient's refusal of administration of antipsychotic medication is contrary to the physician's judgment.
- (b) Procedure and Notice:
  - (1) The hearing will be requested by either the physician, the patient, or the patient's representative or advocate.
  - (2) The patient, his advocate or his representative, and physician shall receive adequate notice.
  - (3) The hearing shall be held within forty-eight (48) hours of the request.
- (c) Purpose of the hearing:
  - (1) The hearing shall determine whether the patient's treatment decision was in fact informed and voluntary. The hospital bears the burden of persuasion by a preponderance of the evidence that consent was informed and voluntary.
  - (2) The medical director has the power to approve the administration of drugs only if:
    - (a) an emergency exists; or
    - (b) the evidence establishes that the patient lacks the capacity to make a competent treatment decision, that the patient's reasons for refusing medication are irrational, that no less intrusive alternative is available, and that the proposed drug is consistent with the patient's best interests and outweighs possible dangers or risks.
  - (3) The medical director shall maintain written records of his decision and the reasons for such decision. These records shall be available for examination by the patient's representative and shall state precisely the basis for the decision.
  - (4) A copy of the written decision shall be given to the patient, his representative, and the advocate.
  - (5) The patient is entitled to seek review of the internal review hearing decision.

The internal review hearing<sup>157</sup> is an important component in the

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*Scope of the Involuntarily Committed Mental Patient's Right to Refuse Treatment with Psychotropic Drugs: An Analysis of the Least Restrictive Alternative Doctrine*, 28 VILL. L. REV. 102 (1982-83). Also, the Supreme Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), found that compelled medication must be the least restrictive means available and that when the cost-benefit ratio of that means is unacceptable it may be eliminated. There must be a careful balancing of the patient's interests against institutional and therapeutic interests furthered by administering the drug.

<sup>157</sup>The basis of the review hearing is suggested in *Rennie v. Klein*, 476 F. Supp. 1294, 1313-15 (D.N.J. 1979). The court entered an order requiring the detailed review procedure, including requirements for a written consent form. The decision was partially reversed and

statutory scheme for a variety of reasons. The procedure not only gives weight to patient concerns and facilitates the discovery of possible drug abuse, the hearing also assures that the patient receives procedural protection of his right to refuse medication.<sup>158</sup> At the same time, the responsibility for the hearing is on those most competent to make a medical decision, the medical professionals.<sup>159</sup> The primary element in this section is the direct review of the individual case rather than the use of a court-appointed guardian to act as a substitute decision-maker. Although due process generally requires judicial hearings, a program that incorporates the procedural safeguards of patient representation, patient advocates, and statutorily delineated procedures for proceedings can meet the requirements of due process,<sup>160</sup> even though court time is not used. Typically when a patient refuses medication, his competence is rendered questionable by his own mental illness, and a guardian is appointed by the court to "stand in" for the patient.<sup>161</sup> However, in practice, the guardianship process proves to be an illusory solution.<sup>162</sup> If the appointment of a guardian is required for a large number of incompetent patients who might refuse medication, courts will be flooded with such petitions, the valuable time of mental health staff and lawyers will be consumed, and millions of dollars will be spent. Also, many basic clinical problems are posed by guardianship: Guardianship results in infringement of the patient's right to prompt, effective treatment in urgent cases; the patient's ability to assume responsibility of his treatment is undercut; and often, guardians are not equipped to understand the complex issues involved in a treatment decision to protect the patient's best interests.<sup>163</sup>

The right to refuse medication presents a unique need for the accommodation of constitutional requirements of due process and patient rights in light of the practical realities of scarce mental health resources. The individual case approach not only helps assure procedural protection

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remanded by the Third Circuit Court of Appeals, 653 F.2d 836 (3d Cir. 1981), *cert. denied*, 458 U.S. 1119 (1981) since New Jersey's procedures already allowed for an internal review.

<sup>158</sup>As the Supreme Court explained in *Parham v. J.R.*, 442 U.S. 584 (1979), informal medical investigative techniques are not inconsistent with due process in the civil commitment context. Similarly, the same types of determinations would not violate due process when applied to the forcible administration of drugs. It makes no difference that the actual decisionmaker is employed by and responsible to the state bureaucracies. *Id.* at 607-13.

<sup>159</sup>This is consistent with the observation of the court in *Rennie*, 476 F. Supp. at 1313-15.

<sup>160</sup>See *supra* note 158 and accompanying text. Additionally, the Supreme Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), recognized that there are at least several potential side effects that powerful medication can induce and that these intrusions negatively affect liberty interests that are protected by the due process clause.

<sup>161</sup>UNIFORM PROBATE CODE § 5-312(a)(3)(1977). "A guardian may give any consent or approval that may be necessary to enable the ward to receive medical or other professional care. . . ."

<sup>162</sup>See Gutheil, Shabiro, & St. Clair, *Legal Guardianship in Drug Refusal: An Illusory Solution*, 137 AM. J. PSYCHIATRY 347 (1980).

<sup>163</sup>Guardians are often difficult to find and many are ambivalent about the patient's needs and rights. There is also a danger of incompetent and weak willed guardians. *Id.*

for the protesting patient but also is more easily handled in the out-of-court setting. The primary protections of the program are provided by the specific procedures which must be followed, the patient advocate, and the unconditional right to appeal.

#### Section 6: Patient Advocate

- (a) Each hospital shall have a patient advocate available to represent patients without cost in all review procedures.
- (b) The advocate must represent the patient's stated position and desires.

A basic element in the protection of the patient's due process rights is his right to representation at the internal review hearing. Patients may choose outside representation or may be represented by the patient advocate.<sup>164</sup> The patient advocate may or may not be associated with the hospital. In *Rennie v. Klein*,<sup>165</sup> the court suggested that advocates be directly appointed, supervised, and paid by the central state agency, and that these advocates could be attorneys, psychologists, social workers, or registered nurses. From a due process standpoint, an independently employed advocate has obvious advantages.<sup>166</sup> However, attempting to create an entirely independent system designed simply to protect potential patient interests is not realistic, given the funding structure of the mental health system. This proposal suggests that the due process rights of the refusing patient may be satisfactorily protected by a patient advocate associated with the hospital. Although this raises the potential for conflicting interests because of the pressures hospital staff might exert on the advocate, the proposal's requirement that the patient advocate must represent the patient's stated position and desires regarding medication serves to ensure the advocate's independent role in protecting the patient's rights. Additionally, the patient always has the right to independent representation and the right to appeal to an independent psychiatrist.

The patient advocate could assist patients in attempting to learn about their medication and their right to refuse medication. The advocate could also help screen patients for the appropriateness of a guardian, for commitment, or for forced medication.

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<sup>164</sup>A patient advocate was suggested in *Rennie v. Klein*, 476 F. Supp. at 1313. The advocate program could easily be expanded to the benefit of both the hospital and the patient.

<sup>165</sup>*Id.*

<sup>166</sup>From a due process standpoint, the sole representation of the patient by an individual employed by the hospital may raise questions concerning the medical bias of the proceedings. However, the advocate system is an attempt at compromise, necessitated by the financial constraints opposing change in the mental health system and the multitudinous legal problems of an indigent or deprived population demanding attention. Often the patient advocate, as a part of the mental health system, may help assure that clinical alternatives have been explored. The legal system has limitations when dealing with the diagnosis and treatment of mental illness.

### Section 7: Appeal to an Independent Psychiatrist

- (a) The patient, patient representative, or patient advocate may appeal the decision of the internal review hearing to an independent psychiatrist.
- (b) The independent psychiatrist shall be appointed by the court and shall not be a staff member of the state hospital.
- (c) Procedures for appeal:
  - (1) The appeal must be made in writing within one week of receipt of the decision of the internal review hearing.
  - (2) The independent psychiatrist must review the internal review hearing decision within three weeks.
- (d) Procedures at appeal:
  - (1) The independent psychiatrist may use his discretion in requesting evidence, interviewing patients or hospital personnel, and reviewing records.
  - (2) The independent psychiatrist shall privately examine the patient before his decision.
  - (3) The independent psychiatrist shall deliver his opinion, in writing, within one week after his hearing.
  - (4) If the independent psychiatrist determines that the patient should be forcibly medicated, this decision shall state a maximum time for administering such medication, not to exceed six months.

The appeal is a protection of due process rights for the protesting patient. The advantage of a system using an independent psychiatrist as a reviewer is the increased likelihood of a correct decision by a qualified medical person, especially as compared to a time consuming judicial review performed by someone outside the medical profession.<sup>167</sup> The fact that the psychiatrist is independent is important to allow review of the situation out of the clinical chain of command. This provision is analogous to a "second opinion," and protects the patient from the possibility of mistreatment or no treatment at all. The hospital staff has the burden of persuasion on the issues.

### IV. Conclusion

This proposal is not intended to represent the only appropriate method for protecting the rights of involuntarily confined mental patients in state

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<sup>167</sup>The use of an independent psychiatrist as decisionmaker was dictated by the district court in *Rennie v. Klein*, 476 F. Supp. 1294 (D.N.J. 1979), *modified and remanded*, 653 F.2d 836 (3d Cir. 1981)(en banc), *vacated and remanded*, 102 S. Ct. 3506 (1982), *on remand*, 720 F.2d 266 (3d Cir. 1983). Although the circuit court decision did not dictate such use, it did not preclude a state from adopting such a system if it desired. 653 F.2d at 854. Since the independent psychiatrist is appointed by the court, his required deadlines are court enforceable.

hospitals who refuse treatment with antipsychotic drugs. Additionally, this proposal could be expanded to include protections for the voluntary patient, protections for private hospital patients, and protections for patients from other forms of therapy and treatment. Many factors unique to individual states will influence the quality of and approach to mental health system evaluations. This proposal represents a realistic procedure for safeguarding rights in a developing constitutional area. Legislatures could use this proposal as a framework from which to judge existing regulatory systems or for designing new ones. In general, the proposal provides elements which allow for maximum patient autonomy in treatment decisions while respecting the medical professional's judgment and discretion to provide timely treatment when necessary.

VICKI ANDERSON



# The Constitutionality of Roadblocks Conducted to Detect Drunk Drivers in Indiana

## I. INTRODUCTION

Public concern regarding the drunk driver and the potential hazards he poses to others on the road has escalated during the last decade. This concern is well-founded; in 1982, drunk driving incidents caused more than twenty-five thousand deaths,<sup>1</sup> in addition to nearly one million other injuries and more than five billion dollars in property damage.<sup>2</sup> As a result, citizens, government officials, and the courts have begun efforts to curb the dangers associated with drunk driving.

Activist groups have formed in every state to educate the public about the drunk driver and to lobby for tougher legislation dealing with the problem.<sup>3</sup> Congress has formed an incentive program which provides funds to states that adopt and implement effective programs to reduce alcohol-related traffic safety problems.<sup>4</sup> State programs, however, must meet strict minimum criteria to qualify for these federal funds.<sup>5</sup> The National Highway Traffic Safety Administration has also formulated measures to address the problem, including suggested procedures to be used for roadblocks designed to detect drunk drivers; implementation of these procedures may permit a state to qualify for supplemental grants.<sup>6</sup> The United States Supreme Court has also recognized the drunk

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<sup>1</sup>H.R. REP. NO. 867, 97th Cong., 2d Sess., 7, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3367, 3367.

<sup>2</sup>Lauter, *The Drunk Driving Blitz*, Nat'l L.J., Mar. 22, 1982, at 1, col. 2.

<sup>3</sup>*See Drunk Driving in America, Study by Insurance Information Institute, reprinted in* Bus. Wk., Oct. 17, 1983, at 176. Grass Roots Groups such as MADD (Mothers Against Drunk Drivers), SADD (Students Against Driving Drunk), and RID (Remove Intoxicated Drivers) have formed, with SADD having a chapter in every state. Most important are the effects these groups have had on the attitudes of people who once condoned drunk driving. A similar group in the early stages of formation is REDDI (Report Every Drunk Driver Immediately) which works in conjunction with law enforcement officials.

<sup>4</sup>Alcohol Traffic Safety-National Driver Register Act of 1982, Pub. L. No. 97-364, 96 Stat. 1738 (codified at 23 U.S.C. § 408 (1982)).

<sup>5</sup>Four minimum criteria must be met to qualify for federal funds: 1) state law must define intoxication as blood alcohol level of 0.10%; 2) state law must provide a prompt, minimum license suspension of 90 days for first offenders and one year for repeat offenders; 3) the state law must provide for a 48 hour prison term or 10 days community service for second offenders; 4) the state must increase enforcement efforts and conduct public awareness campaigns. 23 U.S.C. § 408 (1982).

<sup>6</sup>23 C.F.R. § 1309 (1984). The National Highway Traffic Safety Administration (NHTSA) released an article which suggested operational procedures for the conduct of roadblocks designed to enforce drunk driving statutes. OFFICE OF ALCOHOL COUNTERMEASURES AND OFFICE OF DRIVER AND PEDESTRIAN RESEARCH, NAT'L HIGHWAY TRAFFIC SAFETY AD., U.S. DEP'T OF TRANSP., *THE USE OF SAFETY CHECKPOINTS FOR DWI ENFORCEMENT* (1983) [hereinafter cited to as NHTSA ISSUE PAPER].

driving problem. In *South Dakota v. Neville*,<sup>7</sup> the Court held that a driver's refusal to submit to a blood alcohol test can be disclosed at trial as evidence of guilt, thus indicating its hardline stance against drunk driving.

Since public outcry is at a peak, solutions to the problem of drunk driving are being sought in a wide variety of ways. One method of dealing with the problem is to use roadblocks to stop motorists for a brief period to check their sobriety. The use of roadblocks has increased as the method has become more publicized and its potential for deterrence is established. Questions remain, however, concerning the effect that these roadblocks have on the privacy rights of those citizens, both sober and drunk, who are subjected to this method of detection and law enforcement.

Although the Supreme Court has issued opinions concerning the constitutional permissibility of roadblocks which were designed to further other objectives such as detecting illegal aliens<sup>8</sup> and enforcing public safety laws,<sup>9</sup> the Court has not yet decided the constitutionality of roadblocks designed to detect drunk drivers.<sup>10</sup> Nevertheless, state and local agencies continue to conduct roadblocks designed to detect drunk drivers while their constitutional permissibility remains unresolved. This Note examines the evolution of both federal and state law as it relates to the roadblock enforcement method, reviews the constitutionality of drunk driver roadblocks in Indiana, and suggests certain circumstances and procedures under which these roadblocks might be constitutionally permissible.

## II. FEDERAL EVOLUTION OF THE LAW CONCERNING ROADBLOCK-TYPE INVESTIGATORY STOPS

Whenever a government official or law enforcement officer stops an individual and restrains his freedom of mobility, the officer has seized that person within the meaning of the fourth amendment.<sup>11</sup> Hence, the

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<sup>7</sup>103 S. Ct. 916 (1983).

<sup>8</sup>See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

<sup>9</sup>See *Delaware v. Prouse*, 440 U.S. 648 (1979). See also *United States v. Prichard*, 645 F.2d 854 (10th Cir.), cert. denied, 454 U.S. 832 (1981); *United States v. Miller*, 608 F.2d 1089 (5th Cir. 1979), cert. denied, 447 U.S. 926 (1980); *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa 1980); *State v. Coccomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980).

<sup>10</sup>Flaherty, *As Roadblocks Proliferate, Questions of Legality Persist*, Nat'l L.J., July 25, 1983, at 3, 39, col. 3.

<sup>11</sup>U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or af-

individual's constitutional rights may be affected because the fourth amendment requires that the seizure be reasonable.<sup>12</sup> The purpose of the fourth amendment proscription against unreasonable searches and seizures is to safeguard the privacy and security of individual citizens against arbitrary invasions by government authorities.<sup>13</sup> The Supreme Court has repeatedly held that a detention occasioned by the use of roadblock-type investigatory methods constitutes a seizure within the meaning of the fourth amendment and, therefore, must be reasonable.<sup>14</sup>

*A. The Constitutionality of Roadblocks and Checkpoints Conducted to Detect Illegal Aliens*

Federal law concerning the authority of law enforcement agencies to stop a vehicle and subject its occupants to questioning is rooted in cases involving the detection of illegal aliens near the Mexican border. In *Almeida-Sanchez v. United States*,<sup>15</sup> border patrol officers on roving patrol stopped and searched the defendant's vehicle at a point twenty-five miles north of the Mexican border. During this detention, the officers discovered a large quantity of marijuana as a result of a thorough search of the vehicle.<sup>16</sup> The defendant moved to suppress the evidence gathered as a result of the stop, alleging that the detention violated his fourth amendment rights because his vehicle had been stopped without probable cause.<sup>17</sup>

The Supreme Court found the detention unconstitutional, noting that the fourth amendment requires either probable cause or consent to justify random vehicle searches for illegal aliens by roving border patrol of-

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firmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.*

<sup>12</sup>*Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 16 (1968). *See also* *Brown v. Texas*, 443 U.S. 47, 51 (1979) (The reasonableness of a fourth amendment seizure is assessed by balancing the interest served by the intrusion against the privacy rights of the individual subjected to the seizure.).

<sup>13</sup>*See* *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). *See also* *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

<sup>14</sup>*See* *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-58 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968).

<sup>15</sup>413 U.S. 266 (1973).

<sup>16</sup>*Id.* at 267-68.

<sup>17</sup>*Id.* at 267. The Court rejected the government's contention that § 287(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3) (1952), which authorized warrantless automobile searches "within a reasonable distance from any external boundary of the United States," permitted vehicle searches without probable cause. 413 U.S. at 268, 272-75.

ficers.<sup>18</sup> In a concurring opinion, Justice Powell suggested that an area warrant procedure<sup>19</sup> might be used as a means of limiting police discretion in addition to relieving border patrol officers of the burden of demonstrating probable cause for each vehicle searched.<sup>20</sup> The judicial decision to issue an area warrant must be based on a balancing of interests between legitimate law enforcement interests and the protected fourth amendment rights of the citizens.<sup>21</sup>

The *Almeida-Sanchez* requirements for the brief detention of vehicles were modified in *United States v. Brignoni-Ponce*,<sup>22</sup> another case involving the detention of a defendant's vehicle by two border patrol officers, but at a location away from the border patrol's regular checkpoint. The officers stated that the only reason for stopping the vehicle was that it contained three occupants of Mexican descent. The defendant was subsequently charged with knowingly transporting illegal aliens.<sup>23</sup>

In reaching its decision, the Court utilized a balancing of interests test: the valid public interest of the investigatory stop balanced against the interference with individual liberties that results when an officer stops a vehicle and questions its occupants.<sup>24</sup> After the government presented statistics concerning levels of illegal immigration, the Court recognized the important governmental interest in preventing the mass

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<sup>18</sup>See *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) (warrant not required to stop and search vehicle if probable cause exists). See generally 2 W. LAFAVE, SEARCH AND SEIZURE § 4.1a (1978) (warrantless searches and seizures).

<sup>19</sup>See *Camara v. Municipal Court*, 387 U.S. 523 (1967). The Supreme Court allowed a routine annual inspection of an apartment building without probable cause to believe the city housing code was being violated. However, the Court required that a judicial area warrant be issued to ensure the government interest was legitimate, no alternative enforcement methods were available, and that the inspections involved minimal invasion into personal privacy. *Id.* at 534-38.

<sup>20</sup>413 U.S. at 275, 283-85 (Powell, J., concurring). Powell also identified four factors that might be used to determine the existence of probable cause for a vehicle area search warrant: 1) frequency with which illegal aliens are known or reasonably believed to be transported in the area; 2) proximity of the area to the border; 3) extensiveness and geographic characteristics of area; and, 4) probable degree of interference with the rights of innocent motorists. *Id.* at 283-84.

<sup>21</sup>*Id.* at 284. Two years later in *United States v. Ortiz*, 422 U.S. 891 (1975), the Supreme Court affirmed its prior decision to require probable cause or consent for vehicle searches and detentions at immigration checkpoints. *Id.* at 891-92. The Court recognized that fixed positions of checkpoints may aid in limiting officer discretion in selecting which vehicles to stop, but added that nothing in the procedures used by the officers lessened the invasion of privacy caused by a full vehicle search. *Id.* at 896-97.

<sup>22</sup>422 U.S. 873 (1975).

<sup>23</sup>*Id.* at 875.

<sup>24</sup>*Id.* at 878-80. Other Supreme Court decisions have utilized this balancing of interests mode of analysis. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Terry v. Ohio*, 392 U.S. 1 (1968); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

entry of illegal aliens into the country.<sup>25</sup> As a result, the Court concluded that the minimal intrusion caused by the brief investigatory stop made pursuant to the officers' reasonable suspicion may be permissible because of the lack of alternative methods of enforcing the immigration laws.<sup>26</sup> The Court explained its holding in that the intrusiveness of investigatory stops is modest and "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."<sup>27</sup>

The Court ultimately held that the stop was unconstitutional. The apparent Mexican ancestry of the defendant did not furnish a reasonable suspicion which would justify the detention.<sup>28</sup> Therefore, although the stop in the instant case was held to be unconstitutional, the *Brignoni-Ponce* Court modified the analysis promulgated by *Almeida-Sanchez* in determining the constitutionality of such detentions. The requirements of probable cause or consent were replaced by the requirement that officers base their stops on a reasonable suspicion that an immigration law has been violated.<sup>29</sup> This lesser requirement allowed the government an adequate means of protecting the public interest, and at the same time reduced the potential for indiscriminate officer interference with residents of border patrol areas.<sup>30</sup> The Court added that a further detention or search of the vehicle or its occupants after the initial investigatory stop must be based on probable cause.<sup>31</sup>

This requirement of individualized suspicion established in *Brignoni-Ponce* was later rejected by the Supreme Court in *United States v. Martinez-Fuerte*.<sup>32</sup> In this case, the border patrol routinely stopped vehicles at a permanent checkpoint on a major highway away from the Mexican border for brief questioning of the vehicle's occupants. The defendant was charged with illegally transporting aliens and other immigration offenses. The defendant attempted to suppress the evidence which he contended was gained through the unconstitutional use of a checkpoint or roadblock stop and seizure.<sup>33</sup>

The Court held that the detention of a vehicle stopped at a fixed

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<sup>25</sup>422 U.S. at 878-79.

<sup>26</sup>*Id.* at 879-80.

<sup>27</sup>*Id.* at 880 (quoting Brief for United States at 25).

<sup>28</sup>422 U.S. at 885-87.

<sup>29</sup>*Id.* at 883.

<sup>30</sup>*Id.* In striking down the requirement of probable cause as provided in *Almeida-Sanchez*, the Court cited its decision in *Terry v. Ohio*, 392 U.S. 1 (1968), which permitted some limited types of searches and seizures without probable cause. The *Terry* decision held that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21 (footnote omitted).

<sup>31</sup>422 U.S. at 881-82.

<sup>32</sup>428 U.S. 543 (1976).

<sup>33</sup>*Id.* at 545-49.

checkpoint, even without reasonable suspicion that the vehicle contained illegal aliens, is consistent with the fourth amendment, and that the fixed checkpoint did not require prior authorization by judicial warrant.<sup>34</sup> This holding was based on the Court's decision in *Brignoni-Ponce* which utilized the balancing of interests analysis, weighing the public interest in preventing illegal immigration with the privacy rights assured to individuals by the fourth amendment.<sup>35</sup>

In evaluating the infringement of privacy rights, the Court stated: This objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in the roving-patrol stops. But we view checkpoint stops in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop.<sup>36</sup>

The basis of this conclusion by the Court is derived from the procedures used at the permanent checkpoint.<sup>37</sup> A series of signs was used to alert motorists before they reached the checkpoint. Uniformed officers and official vehicles displayed government authority. The checkpoint and detention facilities were located at permanent structures. Floodlights were used for nighttime operation.<sup>38</sup> These characteristics, the Court noted, served to reduce the amount of subjective intrusion on the individual privacy rights of those individuals subjected to checkpoint stops.<sup>39</sup>

In evaluating the public interest of preventing illegal immigration, the Court cited statistics from the Immigration and Naturalization Service illustrating the severity of the illegal immigration problem.<sup>40</sup> The degree

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<sup>34</sup>*Id.* at 562-67.

<sup>35</sup>*See* *United States v. Brignoni-Ponce*, 422 U.S. at 878; *see supra* note 24.

<sup>36</sup>428 U.S. at 558.

<sup>37</sup>*Id.* at 559-60.

<sup>38</sup>*Id.* at 545-46. Essential to the holding were the procedures used by the border patrol officers at the fixed checkpoint: 1) a large sign was located one mile before the checkpoint with flashing lights warning, "ALL VEHICLES, STOP AHEAD, 1 MILE"; 2) three quarters of a mile later, two more signs over the highway with flashing lights read "WATCH FOR BRAKE LIGHTS"; 3) the checkpoint was located at a California State weigh station; 4) at the checkpoint, two large flashing signs read "STOP HERE—U.S. OFFICERS"; 5) orange traffic cones were placed on the highway funneling traffic into two lanes where a border patrol agent in full uniform stood beside a sign reading "STOP"; 6) U.S. border patrol vehicles with flashing lights blocked traffic in unused lanes; 7) a permanent building was used for temporary detention facilities; 8) floodlights were used during nighttime operation; 9) "point agent" usually screened vehicles as he brought them to virtually a complete stop, and if further investigation was necessary, directed motorists to a secondary investigation area; 10) average duration of stop in secondary investigation was three to five minutes. *Id.*

<sup>39</sup>*Id.* at 560.

<sup>40</sup>*Id.* at 551. The Court noted that a conservative estimate in 1972 produced a figure of one million illegal immigrants, but the Immigration and Naturalization Service in 1976 estimated more than ten to twelve million persons in the U.S. were illegal aliens. *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. at 878).

of effectiveness of checkpoint stops in apprehending illegal aliens was also stressed in addition to the lack of any alternative methods in enforcing immigration laws.<sup>41</sup> As a result, the Court recognized the great public interest which was served by the use of checkpoint stops near the Mexican border.<sup>42</sup>

Furthermore, the Court in *Martinez-Fuerte* rejected the requirement of prior judicial authorization to conduct permanent checkpoint operations.<sup>43</sup> This decision was supported by the argument that strong fourth amendment interests which mandate warrants for private residence searches<sup>44</sup> were not present in the minor intrusion caused by an investigatory vehicle stop.<sup>45</sup> The Court noted that the assurance of proper authority provided by a judicial warrant was satisfied by the "visible manifestation" of state authority at the checkpoints.<sup>46</sup>

As illustrated by this series of cases, the Supreme Court has modified its requirements for the detention of vehicles for investigatory purposes. Initially, the Court in *Almeida-Sanchez* required probable cause,<sup>47</sup> but reduced the requirements in *Martinez-Fuerte* to allow investigatory stops at fixed location checkpoints which were not even based on articulable suspicion.<sup>48</sup> Although these cases involve the evolution of law concerning roadblocks, their real value exists in the establishment of a mode of analysis in determining the constitutional permissibility of the detention itself.

### B. *The Prouse Decision: Answer or Ambiguity?*

The most influential and recent United States Supreme Court opinion supporting the continued use of roadblocks and checkpoints not involving illegal immigration is *Delaware v. Prouse*.<sup>49</sup> In this case, a patrolman in a police cruiser stopped the defendant's vehicle to conduct a routine license and registration check. The patrolman had no probable cause or reasonable suspicion that the defendant or any passengers in the vehicle had violated any law or regulation at the time of the stop. However, as the patrolman was walking alongside the vehicle, he smelled marijuana smoke and subsequently seized a bag of marijuana lying in plain view on the floor of the car.<sup>50</sup> The defendant was indicted for illegal possession of a controlled substance, but moved to suppress the evidence obtained

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<sup>41</sup>428 U.S. at 554.

<sup>42</sup>*Id.* at 562.

<sup>43</sup>*Id.* at 564-67.

<sup>44</sup>*See, e.g.,* McDonald v. United States, 335 U.S. 451 (1948).

<sup>45</sup>428 U.S. at 565-66.

<sup>46</sup>*Id.* at 565.

<sup>47</sup>413 U.S. at 266.

<sup>48</sup>428 U.S. 543.

<sup>49</sup>440 U.S. 648 (1979).

<sup>50</sup>*Id.* at 650.

as a result of the investigatory stop, alleging the stop was unconstitutional.<sup>51</sup> At the suppression hearing, the patrolman stated that he was not acting pursuant to any standards, guidelines, or procedures pertaining to "spot checks" or roving patrol stops.<sup>52</sup> The trial court granted the motion to suppress the evidence and found the stop "wholly capricious and therefore violative of the fourth amendment."<sup>53</sup>

On appeal, the Delaware Supreme Court held the stop to be violative of the fourth<sup>54</sup> and fourteenth amendments<sup>55</sup> of the United States Constitution.<sup>56</sup> The United States Supreme Court granted certiorari<sup>57</sup> and subsequently affirmed the Delaware Supreme Court, holding that the search and seizure was unconstitutional.<sup>58</sup> In reaching its decision, the Court again applied a balancing of interests test, previously used in immigration spot check cases. The Court stated, "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."<sup>59</sup>

In considering the privacy interests of individuals subjected to the random stops, the Court recognized the importance of travel and suggested that people find a greater sense of security while traveling in an automobile than they do as pedestrians.<sup>60</sup> In addition, the Court noted that simply because motor vehicles and highways are subject to government regulation, individuals are not shorn of their expectations of privacy when they step into an automobile.<sup>61</sup> Analyzing the subjective intrusion occasioned by the random stops, the Court referred to *Martinez-Fuerte*<sup>62</sup> and noted that random spot checks were not the same as

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<sup>51</sup>*Id.*

<sup>52</sup>*Id.*

<sup>53</sup>*Id.* at 651.

<sup>54</sup>*See supra* note 11.

<sup>55</sup>U.S. CONST. amend. XIV, § 1. This section provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

<sup>56</sup>382 A.2d 1359, 1364 (Del. 1978).

<sup>57</sup>439 U.S. 816 (1978).

<sup>58</sup>440 U.S. at 648-49.

<sup>59</sup>*Id.* at 654 (footnote omitted). *See supra* note 24.

<sup>60</sup>440 U.S. at 662.

<sup>61</sup>*Id.* at 662-63. *But see* *Rakes v. Illinois*, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring) (public nature of vehicles and state regulation and inspection of motor vehicles reduce motorists' reasonable expectations of privacy). *Katz v. United States*, 389 U.S. 347, 351-53 (1967) (what a person knowingly exposes to the public is not subject to fourth amendment protection); *Id.* at 361 (Harlan, J., concurring) (fourth amendment only protects reasonable expectations of privacy).

<sup>62</sup>428 U.S. 543.

roadblocks which stop all vehicles.<sup>63</sup> The Court suggested, ““At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers’ authority, and he is much less likely to be frightened or annoyed by the intrusion.””<sup>64</sup> Therefore, the Court reasoned that subjective intrusion incurred by motorists subjected to roadblocks is substantially less than that caused by random spot checks.

Regarding the promotion of legitimate governmental interests, Delaware argued the importance of highway safety which is promoted by licensing and registration regulations.<sup>65</sup> Delaware maintained that the enforcement of these motor vehicle laws justified police discretion in randomly detaining vehicles and outweighs the resulting intrusion on individual privacy.<sup>66</sup> In response to this contention, the Court reasoned that discretionary spot checks are not a sufficiently productive mechanism to justify the accompanying intrusion on fourth amendment rights.<sup>67</sup> The Court noted that the foremost method of enforcing licensing and registration regulations is through vehicle checks following observed violations.<sup>68</sup> Thus, the Court found that a more effective alternative means of enforcing the state’s motor vehicle laws existed which did not result in unbridled police discretion in selecting which vehicles to stop.<sup>69</sup>

After engaging in the balancing of interests test, the Court stated:

Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his driver’s license and the registration of the automobile are unreasonable under the Fourth Amendment. This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.<sup>70</sup>

This holding, and more importantly the dicta concerning roadblocks,

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<sup>63</sup>440 U.S. at 657.

<sup>64</sup>*Id.* (quoting *United States v. Martinez-Fuerte*, 428 U.S. at 558).

<sup>65</sup>440 U.S. at 658.

<sup>66</sup>*Id.* at 655, 658.

<sup>67</sup>*Id.* at 658.

<sup>68</sup>*Id.* at 659-60.

<sup>69</sup>*Id.* at 661.

<sup>70</sup>*Id.* at 663 (footnote omitted).

has become the sole basis for the continuing use of roadblocks to stop vehicles for various law enforcement objectives.<sup>71</sup>

With this being the final word by the Supreme Court concerning the permissibility of roadblock stops, the law is in a state of confusion with regard to law enforcement techniques involving the detention of vehicles. Because *Prouse* did not involve the use of roadblocks to detect drunk drivers, many questions which will inevitably be raised in future litigation remain unanswered. For example, the legitimacy of a viable state interest that justifies roadblocks designed to detect drunk drivers has yet to be established. Although *Prouse* did recognize the important state interests of limiting police discretion in the intrusion on individual privacy rights, it did not suggest how these safeguards interrelate to ensure constitutionally permissible roadblocks.<sup>72</sup>

In addition, it has yet to be established to what extent the physical characteristics of a constitutionally permissible roadblock must conform to permanent checkpoints as illustrated in *Martinez-Fuerte*.<sup>73</sup> Although judicial warrants were deemed unnecessary to conduct permanent checkpoint stops in *Martinez-Fuerte*,<sup>74</sup> the law remains unclear regarding whether some form of judicial authorization is necessary to conduct temporary roadblocks.<sup>75</sup> Finally, questions remain concerning how factors unique to roadblocks designed to detect drunk drivers might affect the balancing of interests analysis.<sup>76</sup> *Prouse* and the immigration cases merely established a mode of analysis to assess the constitutionality of roadblock stops and random spot check intrusions. As a result, lower federal and state courts are in conflict concerning the constitutional permissibility of roadblocks.<sup>77</sup>

### III. EVOLUTION OF LOWER FEDERAL AND STATE COURT LAW CONCERNING ROADBLOCKS

Lower federal and state courts are in conflict concerning the permissibility and constitutionality of roadblocks, regardless of their pur-

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<sup>71</sup>However, the *Prouse* decision was construed by the Court in *Brown v. Texas*, 443 U.S. 47 (1979). In *Brown*, the officers observed the defendant in a high drug trafficking area and seized him without reasonable suspicion or probable cause. The Court upheld the seizure stating that "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* at 51 (citing *Delaware v. Prouse*, 440 U.S. at 663; *United States v. Martinez-Fuerte*, 428 U.S. at 558-62).

<sup>72</sup>Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1470 (1983).

<sup>73</sup>*Id.*

<sup>74</sup>See *supra* notes 43-46 and accompanying text.

<sup>75</sup>Note, *supra* note 72, at 1470.

<sup>76</sup>*Id.*

<sup>77</sup>See *infra* notes 78-79.

pose.<sup>78</sup> Only recently have roadblocks designed to detect drunk drivers been challenged, and state courts have confronted the issue of constitutionality with varying results. As the use of such roadblocks proliferates, court decisions analyzing their constitutionality should become standardized. The following cases illustrate the various modes of analysis used in determining the constitutionality of roadblocks conducted for various purposes.

#### A. Court Decisions Which Have Found Roadblocks Unconstitutional

*State ex rel. Ekstrom v. Justice Court of State*<sup>79</sup> is a recent and articulate decision by a state court concerning the constitutionality of roadblocks. In this case, a justice of the peace ruled that a roadblock conducted to detect drunk drivers was unconstitutional under the fourth amendment.<sup>80</sup>

The issue on appeal before the Arizona Supreme Court was whether or not the fourth amendment was violated by roadblocks which stopped vehicles at a temporary checkpoint for brief questioning of the occupants, although there was no reason to believe the driver was drunk or had committed any other offense.<sup>81</sup> The court affirmed the lower court's decision that the roadblock violated the fourth amendment, utilizing the balance of interests analysis established in earlier cases.<sup>82</sup> The court found that the intrusion created by the roadblock was not minimal, citing the amount of discretionary law enforcement activity and the irregular manner of administration.<sup>83</sup> The roadblock was set up at the discretion of the patrolman without specific procedural guidelines. Officers were uncertain how extensively they could legally search cars. Motorists were taken by surprise because no prior notification of the location or purpose of the roadblock had been given.<sup>84</sup>

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<sup>78</sup>Courts which have found roadblocks to be unconstitutional include *State ex rel. Ekstrom v. Justice Court of State*, 136 Ariz. 1, 663 P.2d 992 (1983) (DWI roadblock); *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa 1980) (detection of vandals); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976) (DWI roadblock).

Courts which have found roadblocks to be constitutional include *United States v. Prichard*, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981) (license and registration check); *State v. Deskins*, 234 Kan. 529, 637 P.2d 1174 (1983) (license check); *State v. Coccomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980) (DWI roadblock). *See also* *People v. Peil*, 122 Misc. 2d 617 (1984) (DWI roadblock); *People v. Scott*, 122 Misc. 2d 731 (1983) (DWI roadblock); *People v. John BB*, 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982) (criminal identification checkpoint); *State v. Shankle*, 58 Or. App. 134, 647 P.2d 959 (1982) (license and registration check).

<sup>79</sup>136 Ariz. 1, 663 P.2d 992 (1983).

<sup>80</sup>*Id.* at 2, 663 P.2d at 993.

<sup>81</sup>*Id.* at 3, 663 P.2d at 994.

<sup>82</sup>*See supra* note 24.

<sup>83</sup>136 Ariz. at 5, 663 P.2d at 996.

<sup>84</sup>*Id.* at 5, 663 P.2d at 993.

The court also based its holding on the state's failure to provide evidence of the state's interest in stopping drunk driving or evidence of the intrusion resulting from the roadblock.<sup>85</sup> The state attempted to justify the use of roadblocks by relying on its authority to check drivers' licences and vehicle registrations.<sup>86</sup> The court noted that drunk driving detection would be an incidental benefit but stated, "We cannot approve subterfuge even in a worthy cause."<sup>87</sup> Additionally, the state failed to establish the effectiveness of the roadblock compared with roving patrols based on probable cause.<sup>88</sup> The court concluded that because there was an adequate method of enforcing the drunk driving statutes, there was no need to use roadblocks which caused intrusion on individual privacy rights.<sup>89</sup>

A concurring opinion in *Ekstrom* suggested viable guidelines for permissible roadblocks and enumerated situations in which similar searches are permissible without probable cause.<sup>90</sup> Such situations include when the need for inspection is urgent, when the failure to inspect may lead to potentially harmful results, and where there is a lack of any effective alternative enforcement methods.<sup>91</sup> The concurring opinion also included

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<sup>85</sup>*Id.* at 5, 663 P.2d at 995-96.

<sup>86</sup>*Id.* at 5, 663 P.2d at 996.

<sup>87</sup>*Id.* at 5, 663 P.2d at 996.

<sup>88</sup>*Id.* at 5, 663 P.2d at 995-96.

<sup>89</sup>*Id.* at 5, 663 P.2d at 996. The court noted that the state had stipulated that:

DPS officials, by observing and patrolling, regularly arrest drivers for DWI [driving while intoxicated] when there are no roadblocks. DPS officers are trained to detect drunk drivers on the road on the basis of observation. An experienced DPS officer becomes highly skilled at detecting drunk drivers by watching how a person drives. Without roadblocks, an experienced DPS officer can detect many drunk drivers.

*Id.* at 5, 663 P.2d at 996. As a result, the court responded that the state had stipulated itself out of court and, "If there is an adequate method of enforcing the drunk driving statute, there is no pressing need for the use of an intrusive roadblock device." *Id.*

<sup>90</sup>*Id.* at 6-7, 663 P.2d at 998 (Feldman, J., specially concurring).

<sup>91</sup>*Id.* at 7, 663 P.2d at 998. Justice Feldman also noted suggestions for constitutionally permissible roadblocks which included placement of roadblocks for deterrence, located at times and places based upon the need to supplement random investigatory stops. He also suggested that the efficiency of deterrent roadblocks is heightened by advance publication in the media and on the highways. Such publicity would warn those who might potentially be detected by roadblocks. Such warnings may decrease the chance of apprehending ordinary criminals, but should not have a considerable deterrent effect by either dissuading people not to drink as much, or persuading them to drink at home or to take taxis. Advance notice also limits the intrusion upon personal dignity and security because those persons stopped would anticipate and understand the nature of the investigatory stop. *Id.* at 10, 663 P.2d at 1001.

Examples of reasonable searches and seizures based on a standard other than individualized suspicion include: 1) enforcement of building codes through inspection of premises, *Camara v. Municipal Court*, 387 U.S. 523 (1967); 2) airport luggage check and metal detection searches, *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973); *United*

a reference to Arizona's new statute increasing punishment for driving while intoxicated, but was quick to note that deterrence by punishment is often ineffective unless combined with the fear of apprehension.<sup>92</sup> "An occasional stop at a roadblock for minimal questioning and visual inspection—not search—may well be the price which we have to pay to enforce compliance with the law and rid ourselves of the presently intolerable danger created by drunk drivers."<sup>93</sup> While such stops may be necessary, they must first pass constitutional challenges.

In *State v. Hilleshiem*,<sup>94</sup> the Iowa Supreme Court held that the vehicle stops, set up by low level police officers, of three separate defendants violated their fourth amendment rights and were, therefore, unconstitutional.<sup>95</sup> The first roadblock was initiated without direction from the chief of police or higher authority. The purpose of the roadblock was to identify persons in the vicinity of a highly vandalized area. The second roadblock, on directive of the assistant chief of police, did not stop all vehicles; when one vehicle was stopped, all others were allowed to pass. The roadblocks were not conducted in response to specific vandalism or in an effort to detect violations of motor vehicle laws.<sup>96</sup>

The *Hilleshiem* court analyzed the roadblocks using two sets of criteria: police discretion and the subjective intrusion caused to detained

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*States v. Epperson*, 454 F.2d 679 (4th Cir. 1972); and 3) use of roadblock stops to enforce immigration laws, *United States v. Martinez-Fuerte*, 428 U.S. 543. Although there is no founded suspicion of criminal activity in these situations, the need for inspection is urgent, potential harmful effects are great, and alternative enforcement methods are few. 136 *Ariz.* at 6-7, 663 P.2d at 997-98.

<sup>92</sup>*Id.* at 8-9 n.3, 663 P.2d at 999-1000 n.3.

<sup>93</sup>*Id.* at 9, 663 P.2d at 1000. In a similarly reasoned decision, the Supreme Judicial Court of Massachusetts in *Suffolk in Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983), granted the defendant's motion to suppress evidence obtained at a roadblock designed to detect drunk drivers. The defendant was stopped without probable cause or articulable suspicion. *Id.* at 138, 449 N.E.2d at 350. In holding the roadblock unconstitutional, the court noted that the procedures involved caused motorists a high level of subjective intrusion; officers were allowed too much discretion; the roadblock was poorly illuminated and unsafe for motorists; mechanics of the roadblock were left to the discretion of the officers involved; officers used their own discretion in deciding which vehicles to stop; and motorists were backed up at least two-thirds of one mile, posing a traffic hazard. *Id.* at 142, 449 N.E.2d at 353.

Suggestions for a constitutionally permissible roadblock included: 1) selection of motor vehicles to be stopped must not be arbitrary; 2) safety must be assured; 3) motorists' inconvenience must be minimized; 4) assurance must be given that the procedure is being conducted pursuant to a plan devised by law enforcement supervisory personnel, and 5) advance notice is not a constitutional necessity, but advance publication of the date of the intended roadblock, even without announcing its precise location, might reduce surprise, fear, and inconvenience. *Id.* at 142, 449 N.E.2d at 353.

<sup>94</sup>291 N.W.2d 314 (Iowa 1980).

<sup>95</sup>*Id.* at 319.

<sup>96</sup>*Id.* at 315.

motorists by the roadblocks.<sup>97</sup> Citing *Martinez-Fuerte*,<sup>98</sup> the court stressed the importance of the visibility of the checkpoint, its fixed location selected by administrative officials which results in the limitation of officer discretion and provides motorists with additional notice, and adequate warning signs to provide early warning of the nature of the impending intrusion.<sup>99</sup>

In distilling the earlier United States Supreme Court decisions in this area, the *Hilleshiem* court provided the following guidelines for a constitutionally permissible roadblock: 1) checkpoint location should be selected for its safety and visibility to oncoming motorists; 2) advance warning signs, illuminated at night, should be used to timely inform motorists of the nature of the impending intrusion; 3) uniformed officers in official vehicles should be used to adequately "show . . . the police power of the community";<sup>100</sup> and, 4) the roadblock location, time, and procedures should be predetermined by policy-making administration pursuant to carefully formulated standards and neutral criteria.<sup>101</sup> The court concluded that it was clear that the roadblocks involved did not meet the necessary fourth amendment requirements.<sup>102</sup>

In a unique decision, the South Dakota Supreme Court in *State v. Olgaard*<sup>103</sup> held a roadblock operated by the Alcohol Safety Action Program was unconstitutional. The roadblock was formed by several patrol cars parked with red flashing lights at a point where officers had set up a large stop sign to mark the roadblock. The four officers who were present stopped all vehicles from both directions.<sup>104</sup> If facts which constituted probable cause were discovered, such as the odor of alcohol or observation of awkward actions by motorists indicating inebriation, motorists were directed to secondary detention areas.<sup>105</sup>

The court stated several reasons for finding the roadblock uncon-

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<sup>97</sup>*Id.* at 317-18. *Contra* United States v. Prichard, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981) (court disregarded subjective intrusion); *People v. John BB*, 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982) (court disregarded subjective intrusion).

<sup>98</sup>*See supra* notes 36-39 and accompanying text.

<sup>99</sup>291 N.W.2d at 318. *See* United States v. Maxwell, 565 F.2d 596 (9th Cir.); United States v. Vasquez-Guerrero, 554 F.2d 917 (9th Cir. 1977), *cert. denied*, 434 U.S. 865 (1977); United States v. Sandoval-Ruano, 436 F. Supp. 734 (S.D. Cal. 1977). *See also* State v. Olgaard, 248 N.W.2d 392 (S.D. 1976). *See generally* W. RINGEL, SEARCHES, ARRESTS, AND CONFESSIONS §§ 11.2(d), 15.5(a)(2) (2d ed. 1979). *Contra* State v. Halverson, 277 N.W.2d 723 (S.D. 1979) (construing *Prouse* not to require permanent location; validating a temporary game check site).

<sup>100</sup>291 N.W.2d at 318.

<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>248 N.W.2d 392 (S.D. 1976).

<sup>104</sup>*Id.* at 393.

<sup>105</sup>*Id.*

stitutional. First, the roadblock was not at a permanent location.<sup>106</sup> Second, motorists had no prior knowledge of the roadblock and could not have acquired knowledge because it was set up to stop motorists without warning who passed the roadblock location that night.<sup>107</sup> Finally, no evidence was offered to indicate by whose authority the location of the checkpoint was established.<sup>108</sup>

The unique aspects of the *Olgaard* court's decision were its requirements that roadblocks be established for the purpose of investigating all motorists for liquor law violations and that they be authorized by prior judicial warrant.<sup>109</sup> These requirements would purportedly limit the discretion of officers in determining the location of the roadblock and would thus provide a means of warning motorists in an attempt to reduce the subjective intrusion upon their privacy rights.<sup>110</sup>

### *B. Court Decisions Which Have Found Roadblocks Constitutional*

In a well-reasoned and thorough decision which outlined the evolution of the law regarding roadblock stops, the Supreme Court of Kansas in *State v. Deskins*<sup>111</sup> reversed the findings of a district court and determined that the roadblock at issue was not violative of the fourth amendment.<sup>112</sup> The facts of the case indicate that the defendant was arrested after his auto was stopped by police officers at a roadblock ostensibly set up for the purpose of checking drivers' licenses. The district court found that the state candidly conceded that the roadblock was set up to detect drunk drivers and the the drivers' license check was a facade for such purposes.<sup>113</sup>

At this particular roadblock, thirty-five to forty police officers from the Kansas State Highway Patrol, Shawnee County Sheriff's Office and the Topeka Police Department were present, presumably to check for drivers' licenses.<sup>114</sup> All traffic passing in both directions was stopped. The defendant was stopped and asked to produce his driver's license. Although the officer had not observed the defendant driving his car and therefore had no facts or knowledge which would constitute probable cause, after approaching the vehicle, the officer smelled a strong odor

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<sup>106</sup>*Id.* at 394.

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* at 394-95. If the location of the roadblock is chosen by lower-level officers, the roadblock has characteristics of the roving patrol, causing unconstitutional intrusion upon privacy rights. *Id.*

<sup>109</sup>*Id.* at 395.

<sup>110</sup>*Id.* at 394.

<sup>111</sup>234 Kan. 529, 673 P.2d 1174 (1983).

<sup>112</sup>*Id.* at 542, 673 P.2d at 1185.

<sup>113</sup>*Id.* at 533, 673 P.2d at 1177.

<sup>114</sup>*Id.*

of alcohol and noticed certain physical characteristics of the driver which indicated his inebriation. After subjecting the defendant to a field sobriety test with unsatisfactory results, the defendant was arrested for driving while under the influence and his vehicle was searched.<sup>115</sup> The defendant claimed that this roadblock stop violated his constitutional rights under the fourteenth amendment.

After extensively quoting the *Prouse* decision,<sup>116</sup> and analyzing the evolution of the law concerning immigration checkpoint cases and state court decisions regarding roadblock stops, the *Deskins* court stated:

There can be no doubt that there is an overwhelming public and governmental interest in pursuing methods to curtail the drunk driver. Most states, however, which have considered the validity of roadblocks to "check drivers' licenses and auto registration" or to check for drunk drivers have found the methods used to be violative of Fourth Amendment rights and as failing to meet the implied tests set forth in the extensive dicta in *Prouse*. The use of a DUI roadblock has principally two purposes: (1) to apprehend and remove the drunk driver from the streets before injury or property damage results, and (2) in serving as a deterrent to convince the potential drunk driver to refrain from driving in the first place. As a fringe benefit the DUI roadblock also serves to disclose other violations pertaining to licenses, vehicle defects, open containers, etc.<sup>117</sup>

Further, the court, in recognizing the balancing of interests analysis used by prior courts,<sup>118</sup> enumerated thirteen factors which it deemed necessary to utilize in determining whether a DUI roadblock meets the balancing test in favor of the state.<sup>119</sup> In conclusion, the court stated

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<sup>115</sup>*Id.*

<sup>116</sup>*Id.* at 534, 673 P.2d at 1178-81.

<sup>117</sup>*Id.* at 535, 673 P.2d at 1181-82.

<sup>118</sup>*See supra* note 24.

<sup>119</sup>The court suggested the following factors be considered in determining whether a roadblock conducted to detect drunk drivers meets the balancing test in favor of the state: (1) the degree of discretion left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice given to the public; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type, and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and, (13) any other relevant circumstances which might bear upon the test. The court also noted that all of the above-mentioned factors need not be favorable for the roadblock to be constitutionally permissible, but all factors should be considered. However, certain factors, such as unbridled officer discretion in the field, would be highly determinative of the roadblock's impermissibility because of the requirements set forth in *Prouse*, regardless of other favorable factors. 234 Kan. 542, 673 P.2d at 1185.

that the roadblock in this case passed constitutional muster. Supporting its decision, the court noted that the roadblock was a joint effort of three law enforcement agencies and that the thirty-five to forty officers involved had been briefed, prior to the roadblock, by supervisory personnel concerning their specific duties.<sup>120</sup> Additionally, the roadblock was established in a well-lighted area of a four-lane highway and several police cars were utilized, including cars with flashing lights positioned at the four corners of the roadblock.<sup>121</sup> The time of detention was minimal because sufficient officers were available to assure quick questioning.<sup>122</sup> The court also noted that all vehicles traveling in both directions were stopped, denying officers in the field any discretion in the selection process.<sup>123</sup> Finally, the court acknowledged that the officers involved were in uniform and were readily recognizable as police officers, and that the location of the roadblock was selected by supervisory personnel.<sup>124</sup>

Summarizing the balancing of interests analysis and the above mentioned factors, the court stated:

When we consider the enormity of the injury and damage caused by the drinking driver and the vital interest of every citizen in being protected so far as possible upon the streets and roadways, we find that the public interest in a properly conducted DUI roadblock containing appropriate safeguards outweighs the individual's right to be free from unfettered intrusion upon his Fourth Amendment rights.<sup>125</sup>

The court then stated that the roadblock in this instance was not unreasonable under the fourth amendment. The court continued in dictum stating that it might be advisable for the state to adopt minimum uniform standards for the operation of such vehicular roadblocks rather than leaving the determination of such policies and procedures to local officials.<sup>126</sup>

In a strong dissent, Justice Prager noted his fear that the majority decision would erode the constitutionally guaranteed right of an individual to be free from unfettered intrusions on his or her right of privacy by government officials.<sup>127</sup> While noting the strong public interest in discovering and deterring drunk driving, Justice Prager emphasized the ineffectiveness of accomplishing the desired goal by using roadblocks.<sup>128</sup>

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<sup>120</sup>*Id.*, 673 P.2d at 1185.

<sup>121</sup>*Id.*, 673 P.2d at 1185.

<sup>122</sup>*Id.*, 673 P.2d at 1185.

<sup>123</sup>*Id.*, 673 P.2d at 1185.

<sup>124</sup>*Id.*, 673 P.2d at 1185.

<sup>125</sup>*Id.*, 673 P.2d at 1185.

<sup>126</sup>*Id.* at 542 673 P.2d at 1185-86.

<sup>127</sup>*Id.* at 543, 673 P.2d at 1186 (Prager, J., dissenting).

<sup>128</sup>*Id.* at 544, 673 P.2d at 1187. At this particular roadblock, between 2000 and 3000 thousand vehicles were stopped. A total of 74 violations were discovered, but only 15 were violations involving driving while intoxicated. The duration of the roadblock was

Less intrusive and more productive alternatives exist to detect drunk drivers; "distributing the 35 officers at various places throughout the city for the sole purpose of observing erratic driving and stopping and checking drunk drivers" was one possible alternative.<sup>129</sup>

Justice Prager further stated that the state had failed to meet its burden of proof in establishing that the roadblock/checkpoint promoted the public interests in light of available less drastic alternative measures.<sup>130</sup> Justice Prager concluded by noting his fear that if roadblocks designed to detect drunk drivers are found to be permissible, law enforcement agencies could easily extend this method to discover violations of other criminal statutes and city ordinances.<sup>131</sup> "If each of these political subdivisions decides to maintain a roadblock, we could have 'Checkpoint Charley' at the boundary of every city and every county."<sup>132</sup>

In *United States v. Prichard*,<sup>133</sup> the Tenth Circuit Court of Appeals upheld the use of a roadblock, basing its decision on the dicta in *Prouse* concerning roadblocks.<sup>134</sup> The roadblock involved an attempt by state police to stop all westbound traffic on a highway to check for drivers' licenses and car registrations. When traffic became congested, stopped vehicles were allowed to pass through.<sup>135</sup> The defendant, stopped by the roadblock, was convicted of possession of cocaine with intent to distribute. The court held that the roadblock stop of the defendant's vehicle was proper because reasonable investigative steps were taken after probable cause was found during the detention.<sup>136</sup> Minimal attention was focused on the constitutional permissibility of the initial detention.

The court recognized that the purpose of the roadblock, to check drivers' licenses and car registrations, was legitimate.<sup>137</sup> In addition, the court stated that if in the process of stopping vehicles the officers saw evidence of other crimes, they had the right to take reasonable investigative steps.<sup>138</sup> In a brief analysis of the actual roadblock, the court scrutinized the systematic manner of the administration of the roadblock. In finding an adequate limitation of police discretion,<sup>139</sup> the court held that the roadblock was constitutional and consistent with the dicta in *Prouse* which prohibited the unconstrained exercise of discretion.<sup>140</sup> The

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four hours. Thirty-five officers conducted the operation, resulting in an expenditure of 140 man hours. *Id.*, 673 P.2d at 1187.

<sup>129</sup>*Id.*, 673 P.2d at 1187.

<sup>130</sup>*Id.*, 673 P.2d at 1187.

<sup>131</sup>*Id.*, 673 P.2d at 1187.

<sup>132</sup>*Id.*, 673 P.2d at 1188.

<sup>133</sup>645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981).

<sup>134</sup>See *supra* note 70 and accompanying text.

<sup>135</sup>645 F.2d at 855.

<sup>136</sup>*Id.* at 857.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.* (citing *United States v. Merryman*, 630 F.2d 780, 782-85 (10th Cir. 1980)).

<sup>139</sup>645 F.2d at 857.

<sup>140</sup>See *supra* note 70 and accompanying text.

court completely failed to evaluate the intrusiveness of the stop by investigating the physical characteristics and procedures used in the roadblocks.<sup>141</sup> As a result, the court failed to utilize the balancing of interests test as required by earlier cases.<sup>142</sup> This failure lessens the precedential value of the case.

In a decision which focused on the procedures used in roadblocks and the resulting intrusion on individual privacy rights, the Superior Court of New Jersey in *State v. Cocomo*<sup>143</sup> denied the defendant's motion to suppress evidence obtained as a result of a roadblock.<sup>144</sup> After balancing the state's interests with the individual interests concerning a roadblock which stopped every fifth vehicle and caused minimal intrusion on the individual's privacy, the court found the roadblock to be a reasonable and productive means for identifying intoxicated drivers.<sup>145</sup> The court indicated that its holding was greatly influenced by the procedures employed in conducting the roadblock,<sup>146</sup> which were pursuant to a written policy of the local police department.<sup>147</sup>

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<sup>141</sup>See also *State v. Shankle*, 58 Or. App. 134, 647 P.2d 959 (1982). The defendant was stopped by two officers who were conducting operator's license and vehicle registration inspections. The detention amounted to a limited roadblock, stopping only one car at a time. The roadblock was administered pursuant to provisions of the Oregon State Policy Manual. The defendant was convicted of operating a motor vehicle while his license was suspended. The roadblock did not include the use of warning signs, but merely the officers' gestures to stop. The court found the roadblock was systematic and the nature of the intrusion was minimal. The court also looked at the government interest advanced by the roadblock. *Id.* at 138, 647 P.2d at 961-62.

In a similar holding and rationale, the New York Court of Appeals in *People v. John BB*, 56 N.Y.2d 482, 438 N.E.2d 865, 453 N.Y.S.2d 158 (1982), permitted police to use roving random roadblocks in a rural area in response to recent burglaries. The court recognized the state interest in establishing the identities of persons in the vicinity and based its holding on the element of officer discretion. The procedures used were permissible because all vehicles were stopped and no effective alternatives for accomplishing the purpose existed. The court failed to analyze the amount of subjective intrusion on individual privacy rights and based its decision on the limitation of police discretion and the existence of an important state interest. *Id.* at 439, 438 N.E.2d at 876, N.Y.S.2d at 161.

<sup>142</sup>See *supra* notes 24, 35.

<sup>143</sup>177 N.J. Super. 575, 427 A.2d 131 (1980).

<sup>144</sup>*Id.* at 584, 427 A.2d at 135.

<sup>145</sup>*Id.* at 583-84, 427 A.2d at 134.

<sup>146</sup>*Id.* at 583, 427 A.2d at 135. The procedures used in the roadblock in *Cocomo* included: 1) guidelines were designed to promote safety and reduce anxiety; 2) flares were positioned on the road to alert drivers to use caution and to be alert; 3) uniformed police officers, who counted cars and waved over every fifth, stood at the end of the flares under a street light; 4) drivers of diverted vehicles were directed to an adjacent parking lot where they were questioned by other uniformed officers. The court concluded that these were specific, defined standards in stopping motorists and the system was completely objective in its operation; the criterion employed was purely neutral and involved no discretion. *Id.*, 417 A.2d at 135.

<sup>147</sup>*Id.* at 579 n.1, 427 A.2d at 133 n.1. In September, 1979, the Morris County Prosecutor urged the municipal police department to adopt rules and procedures to adjust their police practices to the *Prouse* proscriptions. A set of regulations approved by the

As these state and federal cases suggest, roadblocks conducted to detect drunk drivers may be constitutional. The integral factors used to determine the constitutional permissibility include the state's interest in the enforcement of laws and the amount of subjective intrusion on individual privacy rights caused by the roadblocks. The latter factor may be determined by the amount of officer discretion involved in the administration of the roadblock and the procedures used to conduct the roadblock. Although Indiana has used and continues to use roadblocks for various law enforcement purposes, Indiana courts have yet to reach a definite conclusion regarding the constitutional permissibility of such stops.

#### IV. EVOLUTION OF INDIANA LAW CONCERNING THE USE OF ROADBLOCKS

Indiana law regarding the use of roadblocks for investigatory purposes is largely undeveloped. It appears that the controlling Indiana statute was Indiana Code § 35-3-1-1, the "Stop and Frisk Statute."<sup>148</sup> However, this statute was repealed and not replaced,<sup>149</sup> and hence, case law now controls the area of the law concerning the detention or "seizure" of persons without probable cause.

Although Indiana case law concerning roadblocks designed to detect drunk drivers is sparse, a few cases can be applied through analogy to develop the law. In *Morgan v. State*,<sup>150</sup> police officers pulled over the defendant's vehicle after he had left the scene of a drug transaction involving an undercover officer. The defendant moved for the suppression of evidence based on the unconstitutionality of the stop, contending the officers did not have probable cause.<sup>151</sup> The court held that under appropriate circumstances, police officers may detain a vehicle for purposes of briefly investigating the possibility of criminal activity without having probable cause to make the arrest.<sup>152</sup> The court continued, how-

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New Jersey Attorney General was forwarded to the chief. The chief then issued a memorandum directing his officers to make the established procedure a part of a pilot program to stem the rising number of fatal and other vehicular accidents. The chief's memorandum stated, "should road checks be made for driving while intoxicated, or other checks it shall be this department's procedure to stop every 5th car during light traffic hours." *Id.*, 427 A.2d at 133 n.1.

<sup>148</sup>IND. CODE § 35-3-1-1 authorized an investigatory stop when a police officer "reasonably infers, from the observation of unusual conduct under the circumstances and in the light of his experience, that criminal activity has been, is being, or is about to be committed." IND. CODE § 35-3-1-1 (1978).

<sup>149</sup>IND. CODE § 35-3-1-1, *repealed by* Act of May 5, 1981, Pub. L. No. 298-1981 § 9(a) 1981 Ind. Acts 2314, 2391.

<sup>150</sup>427 N.E.2d 14 (Ind. Ct. App. 1981).

<sup>151</sup>*Id.* at 15.

<sup>152</sup>*Id.* at 15-16. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Edwards v. State*, 411 N.E.2d 666, 668 (Ind. Ct. App. 1980); *Mayfield v. State*, 402 N.E.2d 1301, 1306 (Ind. Ct. App. 1980).

ever, by adding that in order to justify an investigatory stop, the "officers must be able to point to specific and articulable facts which, when considered together with the rational inferences drawn from those facts, create a reasonable suspicion of criminal conduct on the part of the vehicle's occupants."<sup>153</sup>

In a similar case, the Indiana Supreme Court held in *Rutledge v. State*<sup>154</sup> that the stopping of a truck with a new lawnmower in the back, soon after a robbery in the vicinity had been reported, was not an unconstitutional detention or seizure of the defendant.<sup>155</sup> In so holding, the court recognized that the detention of a single vehicle on a street constitutes a physical and psychological intrusion upon the occupants of the vehicle and involves the interference with freedom of movement.<sup>156</sup> Even a brief investigatory stop of a vehicle and its occupants constitutes a seizure and is unreasonable if not based on specific articulable facts which support an inference that some form of criminal activity has occurred.<sup>157</sup> In ascertaining a test used to evaluate the reasonableness of a warrantless intrusion, the court provided that the facts known to the officer at the time of the stop must be examined to determine whether they reasonably warrant a suspicion of unlawful conduct.<sup>158</sup>

In an attempt to temper the permissibility of intrusions upon privacy rights without probable cause, later courts required that additional criteria be met. In *United States v. Posey*,<sup>159</sup> the court asserted that when an investigatory stop is based upon less than probable cause, the state's interest is secondary to the individual's privacy interest, and the latter must be viewed as "paramount."<sup>160</sup> In *Cooper v. State*,<sup>161</sup> the court held that if a warrantless search or seizure occurs, it is the state's burden to demonstrate "that the police action fell within one of the well established exceptions to the warrant requirement."<sup>162</sup>

The case most on point concerning Indiana's view on the permissibility of roadblocks in general is *Irwin v. State*.<sup>163</sup> However, it must

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<sup>153</sup>427 N.E.2d at 16. See *Reid v. Georgia*, 448 U.S. 438, 440 (1980); *Mayfield v. State*, 402 N.E.2d 1301, 1305 (Ind. Ct. App. 1980).

<sup>154</sup>426 N.E.2d 638 (Ind. 1981).

<sup>155</sup>*Id.* at 642.

<sup>156</sup>*Id.* at 641.

<sup>157</sup>*Id.* See generally *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *State v. Smithers*, 256 Ind. 512, 515, 269 N.E.2d 874, 876 (1971).

<sup>158</sup>426 N.E.2d at 641. See *United States v. Brignoni-Ponce*, 422 U.S. at 884-85; *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968); *Lawrence v. State*, 268 Ind. 330, 332-33, 375 N.E.2d 208, 210 (1978).

<sup>159</sup>663 F.2d 37 (7th Cir. 1981), *cert. denied*, 455 U.S. 959 (1982).

<sup>160</sup>663 F.2d at 41 (citing *Brown v. Texas*, 443 U.S. 47, 51-52 (1979); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979)).

<sup>161</sup>171 Ind. App. 350, 357 N.E.2d 260 (1976).

<sup>162</sup>*Id.* at 356, 357 N.E.2d at 264 (citing *Vale v. Louisiana*, 399 U.S. 30 (1970); *Ludlow v. State*, 262 Ind. 266, 314 N.E.2d 750 (1974); *Smith v. State*, 256 Ind. 603, 271 N.E.2d 133 (1971); *State v. Smithers*, 256 Ind. 512, 269 N.E.2d 874 (1971)).

<sup>163</sup>178 Ind. App. 676, 383 N.E.2d 1086 (1978).

be noted that this case was decided before *Prouse* and thus the court did not have the benefit of the analysis provided by the *Prouse* dictum.<sup>164</sup> In this case, two officers had been instructed to conduct a routine traffic roadblock to check for drivers' licenses, registrations, and inspection stickers of all vehicles reaching the roadblock during a specified time. The two officers viewed the defendant executing a turn near their position and decided to begin their roadblock before the designated time.<sup>165</sup> The officers stopped the defendant without probable cause, admitting later that they were aware of no traffic law violation or any evidence of criminal activity.<sup>166</sup> After asking the defendant to produce his license and registration, the officers smelled alcohol on his breath. The officers asked Irwin if he had been drinking and he replied affirmatively. The officers found marijuana in his vehicle after he had exited the vehicle to take a field sobriety test.<sup>167</sup> The court granted Irwin's motion to suppress the evidence on the finding that the stop and search were unlawful.<sup>168</sup>

The *Irwin* court summarized the Indiana law by stating:

"Our society has a right to protect itself. What is 'unreasonable' under the Fourth Amendment is a function of the totality of conditions existing within our society at any moment in history. Social interests under the police power should give law officers the right to stop users of the highways to check, for instance, their right to use the highway or to check the vehicles for safety standards."<sup>169</sup>

The court continued, stating that "[c]onsequently, no one questions the right of law enforcement officers to establish a roadblock to conduct a routine traffic check of all vehicles and drivers passing through that point during a given period of time."<sup>170</sup>

Because of the amount of discretion allowed to the officers, the subjective intrusion of the defendant's privacy rights, and the lack of articulable suspicion in making the arrest, the court's decision appears to be sound. But the dicta concerning the permissibility of the use of roadblocks is not based on any Indiana or federal precedent.<sup>171</sup> The

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<sup>164</sup>*Id.* at 681 n.3, 383 N.E.2d at 1089 n.3; *see also supra* note 70 and accompanying text.

<sup>165</sup>178 Ind. App. at 678-79, 383 N.E.2d at 1087-88.

<sup>166</sup>*Id.* at 679, 383 N.E.2d at 1087-88.

<sup>167</sup>*Id.*, 383 N.E.2d at 1088.

<sup>168</sup>*Id.* at 676-80, 383 N.E.2d at 1087-88. The court assumed *arguendo* that the seizure of the defendant was permissible, but objected to the procedures used by the officers in conducting the search of the defendant's vehicle.

<sup>169</sup>*Id.* at 681, 383 N.E.2d at 1089 (quoting *Williams v. State*, 261 Ind. 547, 551-52, 307 N.E.2d 457, 460 (1974)).

<sup>170</sup>178 Ind. App. at 681, 383 N.E.2d at 1089.

<sup>171</sup>The *Irwin* decision was decided before *Delaware v. Prouse*, 440 U.S. 648 (1979), which is the leading United States Supreme Court case concerning the constitutional permissibility of roadblocks.

court failed to utilize a balancing of interests approach concerning the constitutional issues which roadblocks involve. No analysis of the procedures used to conduct the roadblock was made to determine the subjective intrusion caused to the defendant involved. As a result, the court's reasoning behind its decision does not correlate with the methods used by courts today. Hence, the precedential value of this decision is quite limited.

As illustrated by these cases, Indiana recognizes the constitutionality of investigatory stops. Moreover, Indiana recognizes the ability of law enforcement agencies to conduct roadblocks. While this position may generally conform to the *Prouse* decision,<sup>172</sup> the mode of analysis to be used by Indiana courts in evaluating the constitutionality of procedures used to conduct roadblocks remains confused and unclear.

#### V. THE USE OF ROADBLOCKS IN INDIANA

Numerous roadblocks have been conducted throughout the State of Indiana for various purposes during the last three years in response to a precedent set by the Marion County Prosecutor's Office. The most recent and articulate analysis of the constitutional permissibility of roadblocks in Indiana is illustrated in *State v. McLaughlin*,<sup>173</sup> a case involving a roadblock conducted in Tippecanoe County. The defendant was stopped during a roadblock admittedly conducted to detect drunk drivers. This particular roadblock stopped 115 cars which resulted in three arrests for driving while intoxicated. The officer responsible for conducting the roadblock, a sergeant with the Indiana State Police with sixteen and one-half year's experience, testified that he was solely responsible for the selection of the site of the roadblock. Authorization for the roadblock was pursuant to a directive from the Indiana State Police headquarters in Indianapolis. The officer also admitted that the only guidelines which he incorporated into the administration of the roadblock were those provided by the Marion County Prosecutor's Office.<sup>174</sup>

The procedures used in conducting this roadblock included the presence of several police cars parked alongside the roadway. After the

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<sup>172</sup>See *supra* notes 49-71 and accompanying text.

<sup>173</sup>Cause No. TC-MT 9515-82, (Tippecanoe County Ct.), *aff'd on other grounds*, 471 N.E.2d 1125 (Ind. Ct. App. 1984). See *Infra* note 190.

<sup>174</sup>Brief for Appellant at 5, 16, Exhibit 1, *State v. McLaughlin*, Cause No. TC-MT 9515-82. The officer referred to guidelines printed in *Prosecutor's Review*, a monthly publication of the Marion County Prosecutor's Office. This publication analyzed *Delaware v. Prouse*. The subject was stated as "Roadblocks to Check for Traffic Violations." This newsletter stressed that the stops must be systematic, although not all vehicles must be stopped. The newsletter also advised that the roadblock stops should be as reasonable and unobtrusive as possible. In addition, the newsletter discussed further detention after the initial investigatory stop and determination of probable cause. The total length of the newsletter was one page.

vehicles were stopped, the drivers were asked to produce their driver's license and registration. If everything was in order, the driver was allowed to proceed. Each detention lasted approximately one to four minutes. Only when an officer detected the odor of alcohol or some other violation was the driver directed to a secondary detention area for further investigation.<sup>175</sup>

The officer who stopped the defendant stated that the only reason for his detention was the roadblock and that the defendant had not been driving in an unusual or erratic manner. The trooper added that he could not conclusively state that the defendant's ability to drive was impaired. After failing the breathalyzer test, the defendant was indicted for driving while intoxicated, but moved to suppress the evidence alleging that the stop was unconstitutional.<sup>176</sup>

The state's argument emphasized that Indiana has a paramount interest in protecting innocent citizens from the potential harm posed by drunk drivers.<sup>177</sup> It also recognized the balancing of interests analysis used by previous courts,<sup>178</sup> suggesting that the court consider the scope of the intrusion, the manner in which the roadblock was conducted, the justification for initiating the roadblock, and the location at which the roadblock was conducted.<sup>179</sup> The state also pointed to earlier decisions, both state and federal, which permitted similar investigatory stops upon less than probable cause.<sup>180</sup>

The defense invoked the sanctity of the fourth amendment, emphasizing that it provides citizens security against arbitrary intrusion by police and also prevents the use of evidence seized illegally, even though the evidence is logically relevant and essential to conviction.<sup>181</sup> In asserting the defendant's fourth amendment rights, the defense added that such rights are not forfeited by entering an automobile and that a citizen's protection against unreasonable seizures still exists.<sup>182</sup>

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<sup>175</sup>Brief for Appellant at 7-8, *State v. McLaughlin*, Cause No. TC-MT 9515-82.

<sup>176</sup>Defendant's Statement of Facts at 2, *State v. McLaughlin*, Cause No. TC-MT 9515-82.

<sup>177</sup>State's Response to Defendant's Motion To Suppress at 3-4, *included in*, Appellant's Pre-Appeal Statement, *State v. McLaughlin*, Cause No. TC-MT 9515-82 (citing *Myrick v. United States*, 370 F.2d 901 (5th Cir. 1967)).

<sup>178</sup>*See supra* note 24 and accompanying text.

<sup>179</sup>State's Response to Defendant's Motion To Suppress at 2, *included in*, Appellant's Pre-Appeal Statement, *State v. McLaughlin*, Cause No. TC-MT 9515-82 (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).

<sup>180</sup>State's Response to Defendant's Motion To Suppress at 4, *included in*, Appellant's Pre-Appeal Statement, *State v. McLaughlin*, Cause No. TC-MT 9515-82 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Irwin v. State*, 178 Ind. App. 676, 383 N.E.2d 1086 (1978); *State v. Cocco*, 177 N.J. Super. 575, 427 A.2d 131 (1980)).

<sup>181</sup>Defendant's Memorandum at 4-5, *State v. McLaughlin*, Cause No. TC-MT 9515-82.

<sup>182</sup>*Id.*

The defense also noted the differences between the procedures used and those suggested by the *Hilleshiem* court.<sup>183</sup> The location of the roadblock was not a place highly visible and safe for oncoming motorists. No advance warning signs were used to inform approaching motorists of the nature of the impending intrusion. There was no predetermination by administrative personnel of the roadblock's location, time, or procedures to be employed pursuant to carefully formulated standards and neutral criteria. The selection of the site was based merely on the experience of the officer in charge and the fact that this location had been a problem area in the past. As a result, the defendant asserted that, according to the procedures required by the *Hilleshiem* court, the roadblock was constitutionally impermissible.<sup>184</sup>

In his holding, Tippecanoe County Court Judge Kenneth Thayer acknowledged that such a roadblock detention of vehicles is a seizure which triggers the constitutional protection of the fourth and fourteenth amendments.<sup>185</sup> Judge Thayer also acknowledged that there is indeed conflicting dicta and commentary on the constitutional permissibility of roadblock searches:

However recent dicta suggests regulatory inspections may be acceptable if guided by previously specified Neutral Criteria. . . . The court has been unable to find any guideline that the State of Indiana has established for the Police to follow in conducting investigatory or roadblock stops. The court does not believe the guideline used here qualifies as previously specified Neutral Criteria.<sup>186</sup>

Accordingly, the court granted the defendant's motion to suppress the evidence.<sup>187</sup>

Although the court's decision appears to be correct, the reasoning behind its decision appears unsound. For example, the Superior Court of New Jersey in *State v. Cocco*<sup>188</sup> upheld the state's roadblock procedures, stating that the detention of every fifth car for drunk driver investigation was a "neutral" seizure involving no police discretion.<sup>188</sup> In the instant case, all approaching vehicles were stopped, eliminating

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<sup>183</sup>*Id.* at 3-4.

<sup>184</sup>*Id.*

<sup>185</sup>Brief for Appellant at 2-3, *State v. McLaughlin*, Cause No. TC-MT 9515-82.

<sup>186</sup>*Id.* at 3.

<sup>187</sup>*Id.* See Sharp, *Evidence from Police Roadblock Ruled Inadmissible*, The Indianapolis Star, Mar. 24, 1983, at 1, col. 5C. Thayer stated, "Police and prosecutors are on the same side of the fence. Perhaps the state can develop neutral criteria. I'm not going to determine exactly who could do it." Thayer also made reference to the roadblock's pretenses of checking for licenses and registration when actually attempting to detect drunk driving. *Id.*

<sup>188</sup>177 N.J. Super. 575, 427 A.2d 131 (1980).

<sup>189</sup>*Id.* at 583, 427 A.2d at 135.

any officer discretion in the selection of victims. This constitutes a "neutral criteria." However, the court failed to analyze the subjective intrusion involved in the roadblock stops, the physical characteristics contributing to the intrusiveness, or to identify and note any procedures for roadblocks which it viewed as constitutionally permissible.<sup>190</sup>

Roadblocks have also been deployed in the Marion County area. The effectiveness and productivity of such roadblocks has yet to be established. Furthermore, various persons responsible for the administration and implementation of roadblocks have expressed the view that probable cause stops are much more effective than roadblocks conducted to detect drunk drivers.<sup>191</sup> Law enforcement agencies, however, have begun to solicit the public's views, in addition to the views of persons actually detained by roadblocks, regarding the effectiveness and degree of anxiety caused by roadblocks conducted to detect drunk drivers.<sup>192</sup>

The location of roadblocks conducted in Marion County is determined by the desires of the Marion County Prosecutor's Office and the Indianapolis Police Department with the assistance of a traffic computer.<sup>193</sup> No prior judicial approval or authorization for the selection of the roadblock location is necessary. Procedures used to conduct the

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<sup>190</sup>Because of this Note's advanced stage of production, it was not possible to incorporate the Indiana Court of Appeals' decision in *State v. McLaughlin*, 471 N.E.2d 1125 (Ind. Ct. App. 1984). The reader is urged to review this decision as it presents the most extensive and current judicial discussion on the drunk driving roadblock issue to date in Indiana.

<sup>191</sup>Lt. Max Brenton, formerly in charge of the Marion County Dangerous Driver Task Force, stated that "roaming policemen have been just as effective as roadblocks as a law enforcement tool. They don't get the publicity of the roadblocks, but they have resulted in arrests of drivers who have tested out with higher Breathalyzer readings." *Police Holiday Roadblocks Result in Arrests*, The Indianapolis Star, Dec. 20, 1982, at 1, col. 3C.

Deputy Prosecutor John Bailey, assigned to the drunk driving cases, stated that, "It's not clear whether the roadblocks or regular probable-cause stops are more effective." Stuteville, *Roadblocks No Fun, But They Get Dangerous Drivers Off The Streets*, The Indianapolis Star, Aug. 16, 1982, at 6, col. 3.

Paul A. Annee, Deputy Chief of the Indianapolis Police Department, noted that three roadblocks in Marion County had resulted in 30 arrests, as opposed to nearly 1000 arrests which had been produced by special probable cause late night patrols. Annee stated that the primary importance of roadblocks is their deterrent effect and their perception by the public. Stuteville, *ICLU Calls Roadblocks Aimed At Drunks Ineffective, Illegal*, The Indianapolis Star, June 2, 1984, at 17, col. 1. See *supra* note 89 (court disallowed roadblock because effective alternative available).

<sup>192</sup>Drivers stopped at roadblock received pamphlets containing questionnaires which could be returned to the police department. The questionnaire included five questions regarding the public views on the deterrent effect on drunk driving caused by roadblocks and the degree of inconvenience caused by the roadblock. The pamphlets also included reasons for the blockade and a list of questions police ask at roadblocks. *Police Give Drivers Chance To Comment*, The Indianapolis Star-News, June 10, 1984, at 6B.

<sup>193</sup>Stuteville, *Police Conducting Computer Study of Drunk Driving*, The Indianapolis Star, Dec. 5, 1983, at 21 (computer primarily used to target late night probable cause patrols); telephone interview with John Bailey, Marion County Deputy Prosecutor (Sept. 22, 1983).

roadblocks are not pursuant to a written policy.<sup>194</sup> Due to a federally funded program, officers have received some training regarding acceptable procedures at roadblocks, but more emphasis has been placed upon drunk driver recognition, a skill to be used in conducting probable cause stops. The officers who do receive this training are then advised to informally instruct the remaining officers who do not receive formal training.<sup>195</sup>

These procedures used to conduct roadblocks do not entirely conform to those suggested by other courts.<sup>196</sup> But until the procedures are evaluated by the courts in Indiana using the modes of analysis established by other jurisdictions, the constitutional permissibility of the procedures will remain unclear and Indiana's law on roadblocks will be left undeveloped.

## VI. ANALYSIS AND SUGGESTED PROCEDURES FOR ROADBLOCKS

The Indiana courts or legislature need to expressly promulgate procedures for constitutionally permissible roadblocks because case law is insufficient to adequately determine what is acceptable.<sup>197</sup> When confronted with cases involving roadblocks, courts need to concentrate on

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<sup>194</sup>Stuteville, *Roadblocks No Fun But They Get Dangerous Drivers Off The Streets*, *supra* note 191, at 1, 6. Procedures for roadblocks used by the Marion County Dangerous Driver Task Force included: 1) police lined right lane of street with flares stretching fifteen car lengths from the intersection; 2) squad cars were located before and after the roadblock as pursuit vehicles; 3) left lane of street was left open to allow traffic through which was not stopped; 4) eight to twelve policemen positioned themselves on both sides of the right lane where cars were checked; 5) the first officer asked drivers to have licenses and registration papers ready for the two officers at the end of the line; 6) police diverted ten cars at a time and then let other traffic pass; 7) police checked the interior of the halted vehicles for liquor, weapons, or other contraband; 8) police monitored actions of occupants for sudden attempts to conceal contraband; 9) least amount of time any group of ten vehicles was detained was eight minutes; 10) at end of line, policeman leaned into the vehicle to ask for "papers" after identifying himself and explaining the purpose of the stop; 11) police asked drivers if they had been drinking and if so how much, and if they were transporting any liquor, drugs, or weapons. This particular roadblock was located on a street in the middle of the block and the detention area was on a dead end street. *Id.*

<sup>195</sup>City, county, and state law enforcement officials announced that Indianapolis was the recipient of a one year \$75,000 federally funded program to reduce alcohol related deaths by removing drunk drivers from the road. Indianapolis was one of three cities selected by the National Traffic Safety Council for program funding. The funding was used to train local law enforcement officers to increase their abilities to stop, arrest, and process drunk drivers. Roadblock screening and processing techniques were also taught. Better equipment, such as portable breathalyzers and a computer to analyze and identify chronic drunk drivers and locations where alcohol related incidents occur, will be acquired using program funds. *Roadblocks Slated To Stop Intoxicated*, *The Indianapolis Star*, May 31, 1984, at 21; Trusnik, *Program Aimed at Drinking Drivers*, *The Indianapolis News*, April 30, 1984, at 1.

<sup>196</sup>*See, e.g., supra* notes 93, 119, 146.

<sup>197</sup>*See supra* note 126 and accompanying text.

the tests used to evaluate the permissibility of the roadblock: a balancing of interests test which incorporates the elements of subjective intrusion and officer discretion.<sup>198</sup> If courts do not consider the subjective intrusiveness as well as the element of officer discretion, many roadblock intrusions may be upheld which are grossly unreasonable under the fourth amendment.<sup>199</sup> Written procedures are stressed because in this manner, officer discretion may be further reduced.<sup>200</sup> In addition, motorists must be aware of the constraints on officer discretion; drivers must perceive a pattern of systematic detentions to assure them that they are not being "singled out." Visible signs of state authority reduce motorists' fright and apprehension.<sup>201</sup>

When determining the amount of subjective intrusion caused to motorists or the level of officer discretion exhibited in the field, application of precedent involving roadblocks designed to detect illegal aliens or public safety law offenders to cases involving roadblocks to detect drunk drivers may not be justifiable or correct. Apprehension and detection of intoxicated drivers usually requires extended investigation involving a variety of field sobriety or chemical tests. This intrusion goes far beyond the brief questioning of motorists or display of documents at immigration checkpoints, which requires no individualized suspicion.<sup>202</sup> Additionally, driving while under the influence of alcohol is a criminal offense compared to the mere infraction involved in the violation of public safety laws.

The other side of the balancing of interests test requires the courts to weigh the state's interest in justifying the roadblock. This interest is then "balanced" against the resulting intrusion upon the individual's privacy rights. Rarely do roadblocks designed to detect drunk drivers fail to promote a legitimate state interest. However, a roadblock should not be used if a less intrusive alternative enforcement method exists.<sup>203</sup>

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<sup>198</sup>See *supra* note 24.

<sup>199</sup>Note, *supra* note 72, at 1475. Compare *United States v. Prichard*, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981); *People v. John BB*, 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982) (court upheld roadblock without analyzing amount of subjective intrusion caused by roadblock).

<sup>200</sup>See, e.g., *supra* note 147 and accompanying text. See also *People v. Scott*, 122 Misc. 2d 731 (1983) (roadblock's constitutionality upheld; written guidelines used for implementation of roadblock); *Garrett v. Goodwin*, 569 F. Supp. 106 (E.D. Ark. 1982) (court required Arkansas State Police to promulgate written policy governing the administration of license and registration roadblocks).

<sup>201</sup>*United States v. Ortiz*, 422 U.S. 891 (1975) (motorists less annoyed by intrusion when detention of other vehicles observed); *United States v. Maxwell*, 565 F.2d 596 (9th Cir. 1977) (routine vehicle detention of little comfort to motorists who know nothing about systematic plan because of light traffic on highway); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976) (appearance, as well as actuality, of limited police discretion is important because of the appearance of limited discretion affects subjective intrusion of roadblock).

<sup>202</sup>Note, *supra* note 72, at 1485.

<sup>203</sup>See *supra* note 89 and accompanying text.

The fourth and fourteenth amendment rights of intoxicated drivers are just as important as those individuals who have completed other crimes in which probable cause is a prerequisite to their arrest. Hence, courts need to focus on the use of roadblocks designed to detect drunk drivers and formulate a mode of analysis which clearly eliminates the inappropriate application of the analysis used in immigration roadblock cases to cases involving roadblocks conducted to detect drunk drivers.

Numerous procedures exist which could be used to reduce the subjective intrusion of roadblocks conducted for the purpose of detecting drunk drivers. Roadblock location should be chosen so as to ensure the safety of motorists.<sup>204</sup> Advance publication of the date on which roadblocks will be conducted would reduce the anxiety of motorists but not decrease the deterrent effect.<sup>205</sup> Warning signs should be used to notify motorists of the impending intrusion;<sup>206</sup> roadblocks could be situated so the motorist has no opportunity to avoid the investigatory stop after being informed of its purpose.<sup>207</sup> Floodlights should be used for nighttime roadblock operations because inadequate illumination contributes to motorist anxiety and increases danger.<sup>208</sup>

The location of roadblocks should be decided by administrative officials and, in addition, be pursuant to a judicial warrant. Although it has been established that there is no need for individualized suspicion in legitimate roadblock operations,<sup>209</sup> a judicial warrant would decrease the possibility of discretionary manipulation in the location selection process. Administrative personnel should have to substantiate their request for the location of a roadblock with empirical data. The judge could then assess the suggested roadblock sites to evaluate discriminatory effects and to minimize the fright and apprehension of potentially detained motorists.<sup>210</sup>

Results of roadblock operations should be logged in order to assess their effectiveness and productivity. As the roadblock's deterrent effect increases, fewer drunk drivers will be apprehended and hence, the roadblock's productivity will decrease. As a result, the roadblock operations

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<sup>204</sup>State v. Hilleshiem, 291 N.W.2d 314, 318 (Iowa 1980); Commonwealth v. McGeoghegan, 389 Mass. 137, 141, 449 N.E.2d 349, 352 (1983); NHTSA ISSUE PAPER, *supra* note 6, at 12 (roadblocks should not create greater traffic hazard than the drunk driving they are trying to curtail).

<sup>205</sup>State ex rel Ekstrom v. Justice Court of State, 136 Ariz. 1, 10, 663 P.2d 992, 1001 (1983), (Feldman, J., specially concurring).

<sup>206</sup>State v. Deskins, 234 Kan. 529, 545, 673 P.2d 1174, 1187-88 (1983) (Prager, J., dissenting) (signs should be used to give approaching motorists advance warning to reduce anxiety and subjective intrusion). *See also supra* note 99 and accompanying text.

<sup>207</sup>*See* NHTSA ISSUE PAPER, *supra* note 6, at 13 (warning signs logically should be placed to give advance warning, but not provide opportunity to avoid checkpoint).

<sup>208</sup>State v. Cocomo, 177 N.J. Super. 575, 583, 427 A.2d 131, 135 (1980); Commonwealth v. McGeoghegan, 389 Mass. 137, 142, 449 N.E.2d 349, 353 (1983).

<sup>209</sup>United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

<sup>210</sup>Note, *supra* note 72, at 1484; State v. Olgaard, 248 N.W.2d 392, 395 (S.D. 1976).

will affect the privacy rights of more and more completely innocent persons. The productivity of the stops affects the balancing of interests analysis used by the courts. The state's interest in conducting roadblocks will be much less if there are substantially fewer drunk drivers on the road because the potential for accidents and injuries caused by drunk drivers will be decreased. Individual privacy rights will be increasingly affected as more innocent persons are subjected to roadblock operations designed to detect drunk drivers. Inevitably, the scales upon which individuals' fourth and fourteenth amendment interests are balanced against the state's interests in reducing drunk driving will tip in favor of the individuals. Drunk driving will be substantially reduced and individuals shall be free from detentions caused by roadblocks conducted to detect drunk drivers.<sup>211</sup>

## VII. CONCLUSION

Roadblocks designed to detect drunk drivers are constitutionally permissible when conducted pursuant to certain procedures and guidelines which prevent excessive intrusion on citizens' constitutionally guaranteed privacy rights. Merely limiting officer discretion does not necessarily decrease the subjective intrusion upon these individual privacy rights. Adoption of procedures which focus on the physical characteristics of roadblocks and which cause minimal fear and anxiety to the motorist is essential to establish uniformity and constitutionality.

There is no question that the state has a legitimate interest in reducing deaths, injuries, and property damage caused by drunk driving. However, individuals also have a valid interest in assuring that their privacy rights are not disregarded by government agencies and officials. The general method to determine the constitutional permissibility of roadblocks as set forth by the courts entails a balancing of interests test: the state's interest in law enforcement is balanced with the individual's privacy interest. In this manner, the constitutionality of specific roadblocks may be affected by the particular differing interests involved. Consequently, this mode of analysis will serve to protect individual privacy rights while allowing the state's enforcement of drunk driving laws.

BRADLEY S. FUSON

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<sup>211</sup>Points not discussed in this Note but meriting consideration relate to the specific objectives of roadblocks designed to detect drunk drivers. Questions remain as to whether roadblocks should be used to detect and apprehend drunk drivers or merely serve as a deterrent to drunk driving. Additional questions arise concerning what constitutes a drunk driver. Some definitions require that the individual's driving abilities be substantially impaired, while others simply define a drunk driver as an individual's who is unable to pass a chemical sobriety test. These questions must be answered before drunk driver-roadblock issues can be entirely resolved. See Note, *supra* note 72, at 1471 n.103 and accompanying text.

# Prejudgment Interest for Personal Injury Litigants: A Summons for Indiana Lawmakers

## I. INTRODUCTION

In Indiana, prejudgment interest<sup>1</sup> is sanctioned by statute for money due on loans or forbearances of money, goods or things;<sup>2</sup> for money due on a written instrument;<sup>3</sup> for money due when an account stated or an account closed is proved; or for money had and received for the use of another person and retained without his consent.<sup>4</sup> The allowance of prejudgment interest, however, is not solely a creature of statute,<sup>5</sup> and courts looking to the common law have allowed awards of prejudgment interest as an element of damages where the loss is ascertainable by fixed rules of evidence and accepted standards of evaluation.<sup>6</sup>

Although prejudgment interest has been recognized as an appropriate element of damages in property torts,<sup>7</sup> the Indiana Supreme Court early implanted a bar to recovery of prejudgment interest in personal injury actions.<sup>8</sup> That bar, established by dicta in the 1911 case, *New York, Chicago & St. Louis Railway Co. v. Roper*,<sup>9</sup> has remained even though it is inconsistent with the general rationale espoused for awarding prejudgment interest: "The award of interest is founded solely upon the

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<sup>1</sup>Prejudgment interest is interest awarded for the lapse of time before judgment and is often defined as interest as damages rather than interest which accrues on a final judgment. See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.5 (1973). [hereinafter cited as *D. Dobbs*].

<sup>2</sup>IND. CODE § 24-4.6-1-102 (1982) provides: "When the parties do not agree on the rate, interest on loans or forbearances of money, goods or things in action shall be at the rate of eight percent (8%) per annum until payment of judgment."

<sup>3</sup>*Id.* § 24-4.6-1-103(a) provides: "From the date of settlement on money due on any instrument in writing which does not specify a rate of interest and which is not covered by IC 1971, 24-4.5 or this article."

<sup>4</sup>*Id.* § 24-4.6-1-103(b) provides: "And from the date an itemized bill shall have been rendered and payment demanded on an account stated, account closed or for money had and received for the use of another and retained without his consent."

<sup>5</sup>See *City of Evansville v. Rieber*, 179 Ind. App. 256, 385 N.E.2d 217 (1979); *Portage Indiana School Constr. Corp. v. A.V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972); *New York Cent. R.R. v. Churchill*, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

<sup>6</sup>*Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800 (7th Cir. 1971); *New York, C. & St. L. Ry. v. Roper*, 176 Ind. 497, 96 N.E. 468 (1911); *Brand v. Monumental Life Ins. Co.*, 396 N.E.2d 417 (Ind. Ct. App. 1979), *vacated on other grounds*, 417 N.E.2d 297 (Ind. 1981).

<sup>7</sup>*Roper*, 176 Ind. 497, 96 N.E. 468.

<sup>8</sup>*Id.* at 510, 96 N.E. at 473 (dictum).

<sup>9</sup>*Id.* After holding that prejudgment interest should be allowed as an element of damages in property torts, the court stated: "Of course, it does not follow that the above rule would apply to personal injury cases . . . ." *Id.*

theory that there has been a deprivation of the use of money or its equivalent and that unless interest be added, the injured party cannot be fully compensated for the loss suffered."<sup>10</sup> A personal injury litigant suffers the loss of the use of his money,<sup>11</sup> so the current denial of prejudgment interest to him results in an unjust denial of full compensation.

This Note will briefly review the history of prejudgment interest, including its development in Indiana case law, and will focus on the current inequity which results from denying prejudgment interest to personal injury litigants. Furthermore, and primarily, this Note will summon the Indiana bench and especially the Indiana legislature to modify, clarify, and expand the law to provide fair and full compensation for personal injury litigants. Only an explicit, mandatory prejudgment interest statute will guarantee that awards of prejudgment interest in personal injury actions are consistent. The enactment of explicit statutory guidelines will enable the courts to avoid the conflict and confusion which have pervaded Indiana courts' awards of prejudgment interest in the past.<sup>12</sup>

## II. HISTORICAL EVOLUTION OF PREJUDGMENT INTEREST

### A. General Development of Prejudgment Interest

From the early days of the common law, interest was considered usurious and was, therefore, viewed with disfavor by the courts.<sup>13</sup> Gradually, conventional interest<sup>14</sup> became acceptable as a way of compensating a creditor for the loss of the use of his money.<sup>15</sup> From that point, acceptance of interest progressed, first being allowed where the sum owed was liquidated, that is, computable without relying on opinion or discretion,<sup>16</sup> and then being extended to sums which were ascertainable.<sup>17</sup>

Awarding interest for damages has generally been within the province of the judiciary, as legislatures have given limited or no guidance to the courts.<sup>18</sup> Some jurisdictions follow the traditional approach and allow prejudgment interest only when specified by contract or statute;<sup>19</sup> a

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<sup>10</sup>Fort Wayne Nat'l Bank v. Scher, 419 N.E.2d 1308, 1310-11 (Ind. Ct. App. 1981).

<sup>11</sup>See *infra* notes 70-77 and accompanying text.

<sup>12</sup>See *infra* notes 41-50 and accompanying text.

<sup>13</sup>See generally C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 51 (1935).

<sup>14</sup>Conventional interest is also referred to as promised interest or interest *eo nomine*.

<sup>15</sup>See C. McCORMICK, *supra* note 13, at 209.

<sup>16</sup>See generally *id.* §§ 54-56. See also D. DOBBS *supra* note 1, § 3.5.

<sup>17</sup>See generally C. McCORMICK, *supra* note 13, § 55.

<sup>18</sup>Note, *Recovery of Prejudgment Interest on an Unliquidated State Claim Arising within the Sixth Circuit*, 46 CIn. L. REV. 151, 152 (1977).

<sup>19</sup>Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U.L. REV. 192, 199-203 (1982) [hereinafter cited as Comment, *Survey*].

majority of jurisdictions sidestep restrictive statutes and use a discretionary approach in awarding prejudgment interest;<sup>20</sup> still other states have adopted statutes or court rules which mandate awards of prejudgment interest under certain circumstances.<sup>21</sup>

This latter statutory approach has become the overwhelming trend in recent years as many states have responded to the need for a policy of fairness which mandates recovery of prejudgment interest in tort cases.<sup>22</sup> Covered by these statutes are personal injury cases in which claimants had formerly been denied prejudgment interest because the claimants' damages were not ascertainable with accuracy before trial and because juries' awards of general damages were viewed as arbitrary.<sup>23</sup>

### *B. The Development of Prejudgment Interest in Indiana*

Although Indiana statutory law permits recovery of prejudgment interest in a contract setting or for money had and received for the use of another person,<sup>24</sup> judicial interpretations of the common law have allowed awards of prejudgment interest as part of recoverable damages in other actions.<sup>25</sup> In the torts area, the Indiana Supreme Court firmly established the award of interest in property torts in the landmark decision, *New York, C. & St. L. Ry. v. Roper*,<sup>26</sup> stating that "except

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<sup>20</sup>*Id.* at 204-209; *see id.* at 204 n.74 (identifying Indiana as state in which courts have "given themselves discretion to grant interest by judicial decision" and citing *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d 630, 635-36 (Ind. Ct. App. 1980)).

<sup>21</sup>Comment, *Survey*, *supra* note 19, at 209-213. *See generally* S. Carrol, *Jury Awards and Prejudgment Interest in Tort Cases* (May, 1983) (A Rand Note prepared for The Institute of Civil Justice, N-1994-ICJ; Rand, Santa Monica, CA 90406) [hereinafter cited as Rand Note]. *See also infra* note 129 and accompanying text.

<sup>22</sup>Rand Note, *supra* note 21, at 1.

<sup>23</sup>*See generally* C. McCORMICK, *supra* note 13, § 55. *See also* RESTATEMENT (SECOND) OF TORTS § 913 comment c (1979).

<sup>24</sup>IND. CODE §§ 24-4.6-1-102, 24-4.6-1-103 (1982).

<sup>25</sup>*See, e.g.*, *Miller v. Billingsly*, 41 Ind. 489 (1873) (interest upheld for gross breach of trust); *Pittsburgh, A.W. & C. Ry. v. Swinney*, 97 Ind. 586 (1884) (prejudgment interest allowed in trespass/conversion case); *Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N.E. 487 (1891) (prejudgment interest awarded for fraudulent appropriation of corporate funds); *State v. Orcutt*, 211 Ind. 523, 199 N.E. 595 (1936) (prejudgment interest awarded in eminent domain proceeding); *Chicago, St. L. & P. R.R. v. Barnes*, 2 Ind. App. 213, 28 N.E. 328 (1891) (interest award upheld for negligent injury of land and cattle); *Wabash R.R. v. Williamson*, 3 Ind. App. 190, 29 N.E. 455 (1891) (interest allowed for damage to cattle); *Brand v. Monumental Life Ins. Co.*, 396 N.E.2d 417 (Ind. Ct. App. 1979) (prejudgment interest allowed where payment of life insurance proceeds withheld), *vacated on other grounds*, 417 N.E.2d 297 (1981); *Board of School Trustees v. Ind. Educ. Employment*, 412 N.E.2d 807 (Ind. Ct. App. 1980) (prejudgment interest awarded on damages from unfair labor practices).

<sup>26</sup>*New York, C. & St. L. Ry v. Roper*, 176 Ind. 497, 508-09, 96 N.E. 468, 473 (1911).

when the amount of recovery is . . . limited by statute, the law declares the rule of full compensation."<sup>27</sup> The *Roper* court provided fixed guidelines for awarding this interest.

1. *Ascertainable Sum Standard.*—*Roper* went beyond the traditional distinction between liquidated and unliquidated damages,<sup>28</sup> and held that prejudgment interest is proper where damages are ascertainable by fixed rules of evidence and known standards of evaluation at a particular time.<sup>29</sup> *Roper*'s "ascertainable sum" test has been reiterated by Indiana courts for over sixty years.<sup>30</sup> Furthermore, federal courts following Indiana law have applied the *Roper* ascertainable sum test in contract actions.<sup>31</sup> The federal courts have gone beyond the limited guidelines of Indiana's interest statute<sup>32</sup> and have applied the common law's ascertainable sum test, for example, in determining whether interest should be allowed on damages incurred from an owner's breach of implied contractual duty not to impede a subcontractor's performance.<sup>33</sup>

The state courts, following the federal lead, have extended the ascertainable sum test to contract actions.<sup>34</sup> In a leading case, *Portage Indiana School Construction Corp. v. A. V. Stackhouse Co.*,<sup>35</sup> the court reviewed the federal decisions and applied the ascertainable sum test to the facts of the *Portage* case but concluded that the damages were not ascertainable.<sup>36</sup> In a post-*Portage* case in the same district, Judge Staton noted that only federal courts had extended the *Roper* test beyond tortious property damages.<sup>37</sup> Judge Staton questioned whether the *Roper* ascertainable sum test should be extended to contract actions, as statutory remedies were available.<sup>38</sup> The court, however, avoided the "ominous

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<sup>27</sup>*Id.* at 508-09, 96 N.E. at 473.

<sup>28</sup>See *supra* note 16 and accompanying text.

<sup>29</sup>*Roper*, 176 Ind. at 508-09, 96 N.E. at 472.

<sup>30</sup>See, e.g., *Independent Five & Ten Cent Stores of New York v. Heller*, 189 Ind. 554, 127 N.E. 439 (1920); *Town & Country Mutual Ins. Co. v. Savage*, 421 N.E.2d 704 (Ind. Ct. App. 1981); *Portage Indiana School Constr. Corp. v. A.V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972).

<sup>31</sup>See *Luksus v. United Pacific Ins. Co.*, 452 F.2d 207 (7th Cir. 1971); *Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800 (7th Cir. 1971); *North Shore Sewer and Water, Inc. v. Corbetta Constr. Co.*, 395 F.2d 145 (7th Cir. 1968).

<sup>32</sup>See *supra* notes 2-4.

<sup>33</sup>*North Shore*, 395 F.2d at 153 (where the circuit court found the damages were not fixed, definite or ascertainable even though the district court found the parties had stipulated that the prime contract unit prices would apply if the plaintiff were entitled to recover damages).

<sup>34</sup>See *infra* notes 35, 40.

<sup>35</sup>*Portage Indiana School Constr. Corp. v. A. V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972).

<sup>36</sup>*Id.* at 373-75, 287 N.E.2d at 568-70.

<sup>37</sup>*Lindenborg v. M & L Builders and Brokers*, 158 Ind. App. 311, 319-21, 302 N.E.2d 816, 821-822 (1973).

<sup>38</sup>*Id.* at 320, 302 N.E.2d at 822.

implications'' of that question by deciding that the plaintiffs' claim did not satisfy *Roper's* requirements.<sup>39</sup>

In 1981, the second district applied the ascertainable sum test and awarded prejudgment interest in a contract rescission case.<sup>40</sup> The application of the ascertainable sum test in property torts and in contract actions demonstrates the Indiana courts' willingness to extend prejudgment interest beyond the narrow confines of the statute.

Even though *Roper* firmly entrenched the ascertainability prerequisite, and later cases stated that "prejudgment interest is proper where the trier of fact need not exercise its judgment to assess the amount of damages,"<sup>41</sup> the cases reflect uncertainty and inconsistency in construing the criteria necessary for establishing ascertainable damages. For example, one line of cases exhibits willingness to find ascertainability although variances exist between damages alleged and damages awarded,<sup>42</sup> while a line of restrictive decisions denies prejudgment interest when differences exist between the amount in the complaint and the amount at judgment.<sup>43</sup>

Further inconsistency in determining ascertainable amounts is evidenced in the consideration of fair rental value as an ascertainable sum by accepted standards of evaluation.<sup>44</sup> If fair rental value has not been agreed to before the dispute between the parties arises, most courts have

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<sup>39</sup>*Id.* Judge Staton's questioning the extension of *Roper's* ascertainable sum test to contract actions seems incompatible with Judge Sharp's application of that test to a contract situation only one year earlier. See *supra* notes 35-36 and accompanying text.

<sup>40</sup>*Economy Leasing Co. v. Wood*, 427 N.E.2d 483 (Ind. Ct. App. 1981).

<sup>41</sup>*Indiana Indus. v. Wedge Products*, 430 N.E.2d 419, 427 (Ind. Ct. App. 1982); see also *Luksus v. United Pacific Ins. Co.*, 452 F.2d 207 (7th Cir. 1971); *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d 630 (Ind. Ct. App. 1980).

<sup>42</sup>See, e.g., *Economy Leasing Co. v. Wood*, 427 N.E.2d at 488 (where prejudgment interest was awarded although the plaintiff failed to plead or obtain the full amount due). A federal case which also followed this liberal approach in determining ascertainability of the amount is *Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800, 805-06 (7th Cir. 1971). For a detailed discussion of this case, see D. DOBBS, *supra* note 1, at 167 (stating that the *Rausser* claim could not be fixed before trial and noting that courts have "a strong tendency to treat any contract claim as one that is ascertainable."). See also *Indiana Indus. v. Wedge Products*, 430 N.E.2d 419, 427 (Ind. Ct. App. 1982) (mere variances in numbers pleaded and numbers awarded do not indicate damages were not ascertainable if damages are subject to simple mathematical computation after liability is found); *Floyd v. Jay County Rural Elec. Membership Corp.*, 405 N.E.2d at 636.

<sup>43</sup>See, e.g., *City of Anderson v. Salling Concrete Corp.*, 411 N.E.2d 728, 735 (Ind. Ct. App. 1980) (noting that a variance in the amount of demand and amount of judgment indicates that the damages were not ascertainable until judgment); *City of Evansville v. Rieber*, 179 Ind. App. 256, 385 N.E.2d 217 (1979) (where prejudgment interest was denied because a disparity existed between the amount pleaded and the amount proved); *Portage Indiana School Constr. Corp. v. A. V. Stackhouse Co.*, 153 Ind. App. 366, 287 N.E.2d 564 (1972) (where the court stated that a wide disparity between invoice, complaint, and actual figure awarded indicated damages were unascertainable before judgment).

<sup>44</sup>See *infra* notes 45-46 and accompanying text.

denied prejudgment interest on the award.<sup>45</sup> However, in a well-reasoned decision, one court allowed prejudgment interest even where the reasonable rental value had to be determined by the trier of fact.<sup>46</sup> As a consequence of these conflicting decisions, plaintiffs may receive inconsistent results in identical fact situations. The distinction between ascertainable and unascertainable damages, therefore, has bred injustices as did the distinction between liquidated and unliquidated damages.

2. *Prejudgment Interest as a Matter of Right.*—*Roper* explicitly enunciated the principle that where damages are ascertainable, the award of interest should be mandatory, not discretionary. “The law dispenses no favors, and jurors . . . should not have the right to allow or refuse interest as one of the elements of just compensation, but in fixing the amount of damages . . . should be instructed to find the value . . . and . . . add interest thereon. . . .”<sup>47</sup>

The Indiana Supreme Court reaffirmed this position in a 1920 case, *Independent Five & Ten Cent Stores of New York v. Heller*,<sup>48</sup> yet “a number of decisions over the years have continued to allude to the discretionary nature of including ‘prejudgment interest’ to compensate a party for the lost use of property.”<sup>49</sup> In *Fort Wayne National Bank v. Scher*, a 1980 decision, Judge Garrard emphasized that *Roper* correctly sets the rule that when damages are complete and ascertainable at a particular time, the award of prejudgment interest is a matter of right in negligent destruction of property cases.<sup>50</sup> Because prejudgment interest is an element of compensation, the courts should follow the *Roper* mandate and give prejudgment interest as a matter of right when the ascertainable sum test has been satisfied.<sup>51</sup>

3. *Bar to Recovery of Prejudgment Interest in Personal Injury Cases.*—Although *Roper* expanded prejudgment interest beyond statutory limits, the decision with one swift stroke felled recovery for personal

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<sup>45</sup>See, e.g., *City of Evansville v. Rieber*, 179 Ind. App. 256, 385 N.E.2d 217 (1979); *Lindborg v. M & L Builders and Brokers*, 158 Ind. App. 311, 302 N.E.2d 816 (1973). For cases allowing prejudgment interest where fair rental value was agreed to, see *Lukus v. United Pacific Ins. Co.*, 452 F.2d 207 (7th Cir. 1971); *Economy Leasing Co. v. Wood*, 427 N.E.2d 483 (Ind. Ct. App. 1981).

<sup>46</sup>*New York Cent. R.R. v. Churchill*, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

<sup>47</sup>*Roper*, 176 Ind. at 509, 96 N.E. at 473.

<sup>48</sup>189 Ind. 554, 127 N.E. 439 (1920).

<sup>49</sup>*Fort Wayne Nat'l Bank v. Scher*, 419 N.E.2d 1308, 1311 (Ind. Ct. App. 1981). Judge Garrard suggested that a quotation from a Pennsylvania decision which was cited in a 1920 Indiana Supreme Court case (*Bryson v. Crown Oil*, 185 Ind. 156, 112 N.E. 1 (1916)) may account for the ensuing confusion in Indiana case law. 419 N.E.2d at 1311. That quotation asserted prejudgment interest was not recoverable as a matter of right. As Judge Garrard emphasized, however, that assertion was not language of the Indiana Supreme Court. *Id.*

<sup>50</sup>*Ft. Wayne Nat'l Bank*, 419 N.E.2d at 1312.

<sup>51</sup>See *supra* text accompanying note 47.

injury litigants. In dicta the court stated: "Of course, it does not follow that the . . . rule would apply to personal injury cases . . ." <sup>52</sup> Although over seventy years have passed since *Roper* was decided, no Indiana appellate cases offer any other analysis or reasoning to justify this inequitable denial of prejudgment interest. <sup>53</sup> Indiana has doggedly followed that traditional rule of denying prejudgment interest in personal injury actions apparently solely for the reason that the damages are not ascertainable.

However, the distinction between personal loss and property loss is unfounded when viewed in the context of *Roper's* doctrine of full compensation for the injured party, including compensation for the deprivation of the use of the party's money or its equivalent. <sup>54</sup> The loss of the use of money from a personal injury loss is no less than from a loss of property and should not go uncompensated simply because the damages may be more difficult to ascertain or calculate.

Indiana courts have extended prejudgment interest to claims not covered by statute. <sup>55</sup> Furthermore, the ascertainable sum test has been applied in contract actions even though statutory remedies exist. <sup>56</sup> The courts may elect, as they are not bound by a prohibiting statute, to extend the ascertainable standard to personal injury damages in determining prejudgment interest just as they have extended the awards of interest in other areas. <sup>57</sup>

Relief from the bar to recovery of prejudgment interest in personal injury suits could also come from the Indiana legislature. During the first regular session of the 103rd Indiana General Assembly in 1983, a bill which would have allowed prejudgment interest in tort cases was introduced in the House of Representatives. <sup>58</sup> The Senate passed a more comprehensive version which allowed prejudgment interest in all civil actions. <sup>59</sup> Although Senate Bill 366 passed only in the house of origin, and House Bill 1974 failed after leaving committee, the threshold endeavor reflects the legislature's willingness to address the current inequity in the law. <sup>60</sup> Further legislative efforts in 1984 during the second

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<sup>52</sup>*Roper*, 176 Ind. at 510, 96 N.E. at 473.

<sup>53</sup>The reiteration of the *Roper* dicta is noted in *Lindenberg v. M & L Builders and Brokers*, 158 Ind. App. 311, 302 N.E.2d 816 (1973).

<sup>54</sup>*Roper*, 176 Ind. at 508-09, 96 N.E. at 472-73.

<sup>55</sup>*See, e.g., Roper* 176 Ind. 497, 96 N.E. 468 (allowance of prejudgment interest on damages from property torts).

<sup>56</sup>*See, e.g., Economy Leasing*, 427 N.E.2d 483.

<sup>57</sup>*See supra* note 25.

<sup>58</sup>H. 1974, 103d Ind. Gen. Ass., 1st Reg. Sess., § 6 (1983).

<sup>59</sup>S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983).

<sup>60</sup>The prejudgment interest bill was possibly overshadowed by a concentration of efforts on passage of other torts legislation. One was the comparative negligence bill (S. 287, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983)), a bill favoring plaintiffs which was

regular session of the 103rd Indiana General Assembly demonstrate the legislature's continued willingness to consider expanding the statutory bounds of prejudgment interest.<sup>61</sup>

### III. THE TIME IS RIPE FOR INDIANA TO PERMIT PREJUDGMENT INTEREST

#### A. Policy Considerations

Indiana courts, like the majority of courts, in the absence of statutory guidelines, have divided torts into two major groups for determining awards of prejudgment interest:<sup>62</sup> torts which affect a person's property or estate and those which affect a person's body or mind.<sup>63</sup> Prejudgment interest is awarded for fraud, trespass, conversion, and negligent destruction of property,<sup>64</sup> but is foreclosed for personal injuries.<sup>65</sup> The courts have limited their focus to the ascertainability of damages before trial,<sup>66</sup> a totally defendant-centered focus which concerns itself with a defendant's liability for interest when he cannot stop the accrual of interest by paying the damages.<sup>67</sup> When attention is concentrated on the defendant, the prejudgment interest is viewed more as a penalty than as an ordinary element of damages which fully compensates the injured party.<sup>68</sup> Because the purpose of damages, however, is to make the plaintiff whole,<sup>69</sup> the

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successful during the 103rd General Assembly. In addition, another pro-plaintiff bill designed to repeal the guest statute (H. 1644, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983)) vied for the legislators' attention during that session.

<sup>61</sup>Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess. (1984); H. 1189, 103d Ind. Gen. Ass., 2d Reg. Sess. (1984). Engrossed Senate Bill 141 passed in the house of origin and was reported out of committee in the House. House Bill 1189, which was a verbatim copy of 1983's Senate Bill 141, failed in committee.

<sup>62</sup>*Roper*, 176 Ind. at 505, 96 N.E. at 471.

<sup>63</sup>C. McCORMICK, *supra* note 13, at 226-227.

<sup>64</sup>*See supra* note 25.

<sup>65</sup>*Roper*, 176 Ind. 497, 96 N.E. 468. Prejudgment interest is also denied in cases of wrongful death. Although the rationale and the policies for allowing prejudgment interest in wrongful death actions are the same or similar to those for allowing prejudgment interest in personal injury cases, the scope of this Note is limited to a consideration of personal injury litigation.

<sup>66</sup>*Rausser v. LTV Electrosystems, Inc.*, 437 F.2d 800, 805 (7th Cir. 1971); *New York, C. & St. L. Ry. v. Roper*, 176 Ind. 497, 510, 96 N.E. 468, 472 (1911).

<sup>67</sup>*See Potter v. Hartzell Propeller, Inc.*, 219 Minn. 513, \_\_\_, 189 N.W.2d 499, 504 (1971) (After acknowledging that a personal injury claimant actually suffers the loss of the use of his money, the court rationalized its denial of prejudgment interest stating that "it would . . . be unreasonable to require defendant to compensate plaintiff . . . [for defendant] cannot ascertain the amount of damages for which he might be held liable [and] cannot . . . thereby stop the running of interest."); *see also* D. DOBBS, *supra* note 1, at 165. *But see* *Busik v. Levine*, 63 N.J. 351, \_\_\_, 307 A.2d 571, 575 (1973), *appeal dismissed*, 414 U.S. 1106 (1973).

<sup>68</sup>*See* Comment, *Survey*, *supra* note 19, at 196-98.

<sup>69</sup>T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 30 at 25 (9th ed. 1912).

focus in considering prejudgment interest as a part of damages should be on the plaintiff whose just compensation is the primary consideration. Three policies are noteworthy in shifting this focus from the defendant to the plaintiff.

1. *Lost Use of Money*.—Interest for the lost use of money is an element of compensation, for the “inherent income-producing ability of money cannot be separate from money itself.”<sup>70</sup> A denial of prejudgment interest deprives a plaintiff of full compensation. While the plaintiff is awaiting adjudication of his claim, which may take years,<sup>71</sup> he must continue paying his medical bills and related expenses and providing for himself and his family. To worsen his plight, he may be forced to borrow money at the prevailing interest rate. Inflation may further undercut the value of his dollars when he finally does recover.<sup>72</sup> Consequently, all the financial ills from the delay between the date an accident occurs and the date of the judgment are posted on the plaintiff’s ledger sheet. An award of prejudgment interest would adjust and convert time-of-accident damages into time-of-judgment damages.<sup>73</sup> Without an award of prejudgment interest, if Plaintiff A and Plaintiff B have exactly the same injury at exactly the same moment with identical losses, Plaintiff A will recover less if his trial is one year later than Plaintiff B’s trial, for he will have been deprived of the use of his money while Plaintiff B enjoyed the use of his.<sup>74</sup>

Although Indiana has segregated classes of plaintiffs for prejudgment interest recovery, the loss of the use of money is as real for a personal injury claimant as it is for one who suffers loss from having his property negligently destroyed<sup>75</sup> or from a breach of contract.<sup>76</sup> Because compensation is the primary purpose of awarding damages in civil cases,<sup>77</sup>

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<sup>70</sup>*Recent Developments—Prejudgment Interest as Damages: New Application of an Old Theory*, 15 STAN. L. REV. 107, 109 (1962); see also *State v. Phillips*, 470 P.2d 266, 273 (Alaska 1970) (“[T]he economic fact [is] that money awarded for any reason is worth less the later it is received.”).

<sup>71</sup>Rosenberg & Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1122-23 (1959) (noting that personal injury cases, especially with serious injuries and large recoveries, often require more than three years to reach judgment).

<sup>72</sup>*Nedd v. United Mine Workers of America*, 488 F. Supp. 1208, 1223 (M.D. Penn. 1980) (“[I]nflation is a prevailing economic fact that provides sufficient compensatory justification, at least under federal law, for prejudgment interest award.”).

<sup>73</sup>Comment, *Survey*, *supra* note 19, at 192.

<sup>74</sup>*State v. Phillips*, 470 P.2d 266, 274 (Alaska 1970).

<sup>75</sup>See *supra* notes 62-65 and accompanying text.

<sup>76</sup>See Hare, *Prejudgment Interest in Personal Injury Litigation: A Policy of Fairness*, 5 AM. J. TRIAL ADVOCACY 81, 85-86 (1981) (noting that the party to a contract voluntarily entered the relationship whereas one suffering personal injury loss has forcibly incurred his loss); see also F. HARE, *MY LEARNED FRIENDS*, p. 6 (1976) for an analysis of the distinction between a contract debt and a tort debt.

<sup>77</sup>See generally, D. DOBBS, *supra* note 1, § 3.1; C. MCCORMICK *supra* note 13, § 5; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2 (4th ed. 1971).

a distinction among classes of plaintiffs should not be made in awarding prejudgment interest to compensate for the lost use of money.

2. *Unjust Enrichment*.—The counterpart of the personal injury litigant's losing the use of his money while awaiting the adjudication of his claim is the defendant's unjust enrichment from having the use of the plaintiff's money.<sup>78</sup> The purpose of an award of prejudgment interest is not to punish the defendant<sup>79</sup> but is simply to require him to disgorge the inequitable benefits derived from the use of the plaintiff's money.<sup>80</sup> The defendant's gain is a practical consideration in personal injury actions where the defendants are generally covered by insurance,<sup>81</sup> and "the carrier receives income from a portion of the premiums on hand set aside as a reserve for pending claims."<sup>82</sup>

The tortfeasor should not be allowed to profit from the use of money owed to the injured plaintiff. Although referring to a tortfeasor in property destruction rather than personal injury, a quote from the *Roper* decision is equally appropriate for one who causes a personal injury: "Surely the law ought not to hold out to a tort-feasor a premium on delay."<sup>83</sup>

3. *Settlement of Claims*.—A third policy consideration is that prejudgment interest will promote settlement, and the judicial system, consequently, will be aided in administering justice.<sup>84</sup> Increased settlements would aid in decongesting court dockets.<sup>85</sup> When prejudgment interest is banned, the defendant has little or no incentive to negotiate, to offer or to accept a reasonable settlement, for he has little to lose by delay as his money lies accumulating interest, especially if he is liable for a large judgment.<sup>86</sup> As the Michigan Supreme Court stated, "Without such

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<sup>78</sup>See Hare, *supra* note 76, at 89; Note, *supra* note 18, at 154-155.

<sup>79</sup>See *supra* text accompanying note 10.

<sup>80</sup>*Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 594-95 (2d Cir. 1961) (stating that regardless of whether defendant is at fault for delay, the plaintiffs have lost, and the defendant has benefitted), *cert. denied*, 368 U.S. 989, 370 U.S. 937 (1962).

<sup>81</sup>North Carolina's prejudgment interest statute specifically limits interest to compensatory damages where claims are covered by liability insurance. See N.C. GEN. STAT. § 24-5 (Supp. 1981).

<sup>82</sup>*Busik v. Levine*, 63 N.J. 351, —, 307 A.2d 571, 575-76; see also *Cree Coach Co. v. Wolverine Ins. Co.*, 366 Mich. 449, 463, 115 N.W.2d 400, 407 (1962) ("All the time the defendant insurance companies have been withholding payment, they have had the use of the money due to the plaintiffs with the consequent possibility of realizing income therefrom.").

<sup>83</sup>*Roper*, 176 Ind. at 508-09, 96 N.E. at 473.

<sup>84</sup>*State v. Phillips*, 470 P.2d 266, 274 (Alaska 1979); *Denham v. Bedford*, 407 Mich. 517, —, 287 N.W.2d 168; 175 (1980).

<sup>85</sup>See *State v. Phillips*, 470 P.2d at 274; *Busik v. Levine*, 63 N.J. at —, 307 A.2d at 575.

<sup>86</sup>*Denham v. Bedford*, 407 Mich. at —, 287 N.W.2d at 175. However, the delay argument cuts both ways. If the defendant should not be allowed to benefit from delay,

an incentive, the insurer may refuse to settle a meritorious claim in hopes of forcing plaintiff to settle for less than the claim's true value."<sup>87</sup> Prejudgment interest not only compensates the claimant, but liability for prejudgment interest may serve as an incentive for the insurer promptly to settle a meritorious claim.<sup>88</sup>

*B. Courts Could Allow Prejudgment Interest Under Present Standards*

As Professor McCormick stated almost fifty years ago, "Courts have usually summarily discountenanced interest in all personal injury cases. This generalization (like so many dicta about interest, thrown off hurriedly as relating to a minor feature of the case) is hasty and injudicious."<sup>89</sup> The time is long overdue for Indiana courts to institute a policy of fairness by dispensing with the dictum in *Roper* which injudiciously bars the recovery of prejudgment interest in personal injury suits. Justice and parity in reasoning dictate that Indiana courts at least allow recovery for purely pecuniary losses such as medical bills and lost wages as these are sums which are ascertainable at a particular time by fixed rules of evidence.<sup>90</sup>

Although some Indiana cases have stated that prejudgment interest is only proper when the trier of fact need not exercise its judgment to assess the amount of damages,<sup>91</sup> the court in *New York Central R.R. v. Churchill*<sup>92</sup> allowed prejudgment interest even though the fact finder had to make a determination of the reasonable rental value of certain destroyed property.<sup>93</sup> The court acknowledged that there was language in *Roper* suggesting that "[i]n all personal injury cases . . . where the damages are . . . peculiarly within the province of the jury to assess at the time of the trial, no interest is permissible."<sup>94</sup> However, the *Churchill* court emphasized that this dictum was not language from the Indiana Supreme Court but was from a Utah case cited by the Indiana Supreme Court.<sup>95</sup> The court in *Churchill* further noted that "[t]he [*Roper*] court did not conclude that merely because the assessment of damages was peculiarly within the province of a jury or court, that interest on

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neither should the plaintiff. See ME. REV. STAT. ANN. tit. 14, § 1602 (Supp. 1983) (suspending interest during a plaintiff-requested continuance of greater than thirty days).

<sup>87</sup>Denham v. Bedford, 407 Mich. at —, 287 N.W.2d at 175.

<sup>88</sup>See *supra* text accompanying note 10; Hare, *supra* note 76 at 90; Podgers, *Prejudgment Interest Held Available in DC-10 Suits*, 66 A.B.A. J. 137 (February, 1980).

<sup>89</sup>See MCCORMICK, *supra* note 13, § 56 at 224.

<sup>90</sup>See D. DOBBS, *supra* note 1, at 165 n.4; C. McCormick, *supra* note 13, § 57.

<sup>91</sup>See *Indiana Indus. v. Wedge Products*, 430 N.E.2d 419, 427 (Ind. Ct. App. 1982).

<sup>92</sup>*New York Cent. R.R. v. Churchill*, 140 Ind. App. 426, 218 N.E.2d 372 (1966).

<sup>93</sup>*Id.*

<sup>94</sup>*Roper*, 176 Ind. at 507, 96 N.E. at 472.

<sup>95</sup>*Churchill*, 140 Ind. App. at 435-36, 218 N.E.2d at 378.

such damages should not be allowed.”<sup>96</sup> The *Churchill* decision to allow prejudgment interest even if the trier of fact must make a value determination<sup>97</sup> is a sound one, because a plaintiff should not be deprived of interest simply because the jury must make a value determination.

Although the rule in Indiana is that damages for medical expenses are awarded based on reasonable value as determined by the trier of fact,<sup>98</sup> prejudgment interest for medical expenses would not be precluded under the *Churchill* rationale. Medical bills are ascertainable before trial, and they are evidence for the jury’s consideration in determining reasonable damages for medical expenses.<sup>99</sup> The plaintiff should not be deprived of prejudgment interest on these costs simply because the jury must assess their reasonableness.

Other damages in a personal injury suit, however, would not qualify under the ascertainable standard. Because nonpecuniary damages such as those for pain and suffering are not compensatory in the ordinary sense of making the plaintiff whole or replacing his loss,<sup>100</sup> and because there is no market value by which they can be measured, these losses are not liquidated or ascertainable and, therefore, would not receive prejudgment interest under the ascertainable sum standard.<sup>101</sup>

Indiana courts recognize that prejudgment interest is not solely a creature of statute but is allowed as an element of damages for compensation by the judicial branch.<sup>102</sup> However, the courts have refused to extend their discretion to the recovery of prejudgment interest in personal injury suits as an element of compensation, even though in a 1980 fraud case the court noted that prejudgment interest was not “a question of equity, but an element of compensatory damages.”<sup>103</sup> Still, the courts have maintained an impenetrable barrier against prejudgment interest for personal injuries.<sup>104</sup> Dicta from the 1911 *Roper* decision and a tenacious clinging to the ascertainable standard against all parity in reasoning have kept the courts’ doors closed on this injustice.

As no statute prohibits the award of prejudgment interest for personal injury damages, the courts could remove the barrier to recovery of prejudgment interest for personal injury litigants by applying the standard

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<sup>96</sup>*Id.*

<sup>97</sup>See *supra* text accompanying notes 92-93.

<sup>98</sup>See, e.g., *Herrick v. Saylor*, 160 F. Supp. 25, 29 (N.D. Ind. 1958); *Havanagh v. Butorac*, 140 Ind. App. 139, 144, 221 N.E.2d 824, 828 (1966); *Kampo Transit, Inc. v. Powers*, 138 Ind. App. 141, 161, 211 N.E.2d 781, 793 (1965).

<sup>99</sup>*Herrick v. Saylor*, 160 F. Supp. 25, 29.

<sup>100</sup>See D. DOBBS, *supra* note 1, at § 8.1 at 544-45; C. MCCORMICK, *supra* note 13, § 57.

<sup>101</sup>*Id.*

<sup>102</sup>*Floyd v. Jay Rural Elec. Membership Corp.*, 405 N.E.2d 630, 636 (Ind. Ct. 1980).

<sup>103</sup>*Id.*

<sup>104</sup>See, e.g., *Lindenberg v. M & L Builders and Brokers*, 158 Ind. App. 311, 318-319, 302 N.E.2d 816, 821 (1973).

of ascertainability enunciated in *Roper* to personal injury cases and disarming the *Roper dicta* which have heretofore totally denied prejudgment interest.

*C. Legislative Action is the Preferable Solution for the Denial of Prejudgment Interest in Personal Injury Actions*

Indiana courts, like other courts,<sup>105</sup> could address the denial of prejudgment interest in personal injury cases based on a sense of equity, and award prejudgment interest in personal injury suits without legislative guidelines.<sup>106</sup> However, the lack of precedent in Indiana and the necessity for the courts to square the decisions with rulings in other types of prejudgment interest cases would likely result in inconsistent judgments as the courts struggled to establish standards in personal injury cases. Litigants would, consequently, be at a loss to discern which factors control an award of prejudgment interest in a certain case, and outcomes of similar cases would be unpredictable. Already inconsistencies and varying requirements plague the predictability of awards of prejudgment interest in other cases in Indiana.<sup>107</sup> Adding another line of cases would result in inconsistent judgments as the common law developed in the different courts, especially in light of the various damages involved in a personal injury suit.<sup>108</sup>

A more appropriate response to the current inequity caused by the denial of prejudgment interest would be for the Indiana legislature to follow the lead of the many states<sup>109</sup> which have adopted statutes which allow prejudgment interest for personal torts as well as property torts.<sup>110</sup>

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<sup>105</sup>See, e.g., *American Ins. Co. v. Naylor*, 103 Colo. 461, 87 P.2d 260 (1939) (permitting plaintiff to claim interest on personal injuries from date suit filed); *Lucas v. Leggit & Myers Tobacco Co.*, 51 Hawaii 34, 461 P.2d 140 (1960) (stating that since prejudgment interest was not expressly forbidden by state statute, the court was free to permit it). See Brennan, *Prejudgment Interest in Wisconsin Personal Injury Cases*, 56 Wis. B. BULL. 18 (1983) (discussing the developing trend in the Wisconsin judiciary to allow prejudgment interest in personal injury cases and arguing that the legislature is best suited to implement a fair and workable policy of prejudgment interest in personal injury cases).

<sup>106</sup>See *In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979*, 480 F. Supp. 1280, 1285 (N.D. Ill. 1979) (determining that as a matter of law "fair and just compensation . . . must include interest on a judgment in a wrongful death case from the date of death."), *aff'd*, 644 F.2d 633 (7th Cir. 1981).

<sup>107</sup>See *supra* notes 41-46 and accompanying text.

<sup>108</sup>See *supra* notes 90-100 and accompanying text.

<sup>109</sup>According to a 1983 Rand study, twenty-six legislatures have enacted prejudgment interest statutes for personal torts. Rand Note, *supra* note 21 at 1. For a look at how Canadian lawmakers have dealt with this issue, see *Pre-judgment Interest and the Personal Injury Action*, 4 ADVOCATES' Q. 219 (1983) (reviewing the development of the law regarding awards of pre-judgment in personal injury suits in Ontario in the six years since Ontario effected a radical change in its statutory law relating to damage awards).

<sup>110</sup>See *infra* note 93 and accompanying text.

In 1983 legislative sessions, at least twenty-six states proposed new or expanding prejudgment interest legislation.<sup>111</sup> Indiana was among the states proposing new legislation with the introduction in both houses of bills which sanctioned prejudgment interest in personal injury actions and with the passage of the Senate version in that house.<sup>112</sup> Indiana also considered prejudgment interest legislation in its 1984 legislative session.<sup>113</sup>

Even though the 1983 and 1984 efforts which would have allowed prejudgment interest in all tort cases failed, the Indiana legislature remains the proper vehicle through which to insure that personal injury litigants are fully compensated for their losses and that juries are provided with clear guidelines for awarding prejudgment interest rather than randomly and indiscriminately "adding in" what they consider a fair amount to compensate for the plaintiff's loss of the use of his money while awaiting final adjudication of his claim.<sup>114</sup> As one federal court noted, "[N]o one would be so naive as to suppose that juries do not throw into the scales the years that a plaintiff may have had to wait before his case can be heard by a jury . . . . Likewise judges doubtless make some allowance for loss because of the law's delay."<sup>115</sup>

Furthermore, legislative action would avoid the confusion which might result from the courts' endeavor to forge new guidelines for personal injury recovery.<sup>116</sup> Although limited interest could be recovered by the application of current common law rules, results would likely be inconsistent as courts varied in their application of those rules.<sup>117</sup> The courts would be faced with the confusion between mandatory awards and discretionary awards which has surfaced in property torts cases.<sup>118</sup> The problems which have occurred in other cases when the trier of fact must determine value might also breed the confusion in personal injury cases which has been apparent in other actions.<sup>119</sup> Therefore, the more satisfactory resolution would be enactment of a prejudgment interest statute by the Indiana legislature.

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<sup>111</sup>Rand Note, *supra* note 21, at 1.

<sup>112</sup>H. 1974, 103d Ind. Gen. Ass., 1st Reg. Sess., § 6 (1983); S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983).

<sup>113</sup>See *supra* note 61.

<sup>114</sup>See, e.g., *Moore-McCormack Lines v. Richardson*, 295 F.2d 583, 594 (2d Cir. 1961); *Chicago v. Barnes*, 2 Ind. App. 213, 28 N.E. 328 (1891) (where plaintiff had a loss of \$165 to land and \$100 to cattle, jury returned a \$277.41 verdict. Court on appeal allowed jury to add this interest.); Keir and Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW 129 (1983); Hare, *supra* note 76, at 90; Rand Note, *supra* note 21, at 13 (Results of Cook County, Illinois, study show juries provide an implicit 3.7% interest rate for delay over and beyond the interest rate.).

<sup>115</sup>*Moore-McCormack Lines*, 295 F.2d at 594.

<sup>116</sup>See, e.g., *supra* notes 42-46, 49-50 and accompanying text.

<sup>117</sup>*Id.*

<sup>118</sup>See *supra* notes 47-50 and accompanying text.

<sup>119</sup>See *supra* notes 41-46, 91-92 and accompanying text.

#### IV. SUGGESTIONS FOR A STATUTE TO PROVIDE JUST COMPENSATION FOR PERSONAL INJURY LITIGANTS

Even though the Indiana Senate's efforts in considering a prejudgment interest statute are laudable, the 1983 proposed bill left the award of prejudgment interest, including date of accrual, rate of interest, types of damages to receive interest, and the determination of what constitutes a bona fide settlement offer, totally to the courts' discretion.<sup>120</sup> Although the award of prejudgment interest remained discretionary, the Senate's effort in 1984 mended some of the 1983 defects. The date of accrual was fixed; the rate of interest was still discretionary in the 1984 version, but the range of discretion was narrowed by fifty percent; and the settlement offer was specifically defined.<sup>121</sup>

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<sup>120</sup>S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. (1983) provides:

SECTION 1. IC 24-4.6-2 is added to the Indiana Code as a NEW chapter to read as follows

Chapter 2. Prejudgment interest.

Sec. 1. This chapter does not apply to actions against the state or against any other governmental entity.

Sec. 2. In a civil action resulting in a judgment awarding damages, the court may award interest on the judgment over the period between the date on which the cause of action arose and the date of the judgment, or over a lesser period of time. In deciding whether to grant interest under this section, the court shall consider the following factors;

(1) Whether the action concerned money or goods wrongfully taken.

(2) Whether the action was to recover money or goods withheld in an unreasonable manner.

(3) Whether the action was to recover damages based upon bodily injury, property damage, or death.

(4) Whether the plaintiff suffered unusual expense between the date on which the cause of action arose and the date of the judgment as a result of the defendant's actions.

(5) If the action was to recover an amount due under a promissory note or other contract, whether the amount due and due date under the note or contract were reasonably ascertainable.

Sec. 3. In any action, if a bona fide offer of settlement was previously made in writing by the party against whom judgment is subsequently entered, and the amount of the offer was:

(1) substantially identical to the amount of the judgment; or

(2) more favorable to the prevailing party than the judgment;

no interest may be allowed under section 2 of this chapter for the period between the date on which the offer of settlement was made and the date of the judgment.

Sec. 4. The rate of the interest on a judgment under section 2 of this chapter may not exceed the rate set by IC 24-4.6-1-101 for interest on the judgment from the date of the judgment until satisfaction.

<sup>121</sup>Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess. (1984) provides:

SECTION 1. IC 34-2-36 is added on the Indiana Code as a NEW chapter to read as follows:

Chapter 36. Prejudgment Interest.

Sec. 1. In any civil action, other than an action based on contract, the court

In order to avoid discrepancies in prejudgment interest awards among personal injury litigants who should each receive full compensation for the lost use of money, the legislature should enact a mandatory statute. Only a mandatory statute will assure full compensation and consistent judgments.

Several factors should be considered by the Indiana legislature in order to avoid later conflicts when the courts construe that statute. The more carefully these factors are considered and the more specifically the guidelines are drafted, the more equitable will be the awards granted to individual litigants.

### A. *Date of Accrual*

Some states' prejudgment interest statutes set the date of accrual at the date the cause of action accrued.<sup>122</sup> Some leave the date of accrual to the courts' discretion.<sup>123</sup> A majority of states, however, set the date of accrual as the date the complaint was filed.<sup>124</sup> This latter alternative

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may award prejudgment interest in accordance with this chapter. However, such interest may not be awarded until judgment has been rendered in the action. Sec. 2. The period with respect to which prejudgment interest may be awarded begins one (1) year after the cause of action arose and may not extend past the date of judgment. In addition, the period may not exceed forty-eight (48) months.

Sec. 3. Prejudgment interest that is awarded under this chapter must be awarded as simple interest. The rate of simple interest awarded under this chapter must be equal to or greater than six percent (6%) per year but may not exceed twelve percent (12%) per year.

Sec. 4. Prejudgment interest may not be awarded under this chapter:

(1) if within one hundred eighty (180) days after the filing of the action a written offer of settlement was made by the party against whom the prejudgment interest is requested, if:

(A) the term of the offer included payment within sixty (60) days after the time of acceptance of the offer of settlement; and

(B) the amount of the offer of settlement was at least eighty percent (80%) of the amount of the judgment; or

(2) as to any award of punitive damages.

Sec. 5. The state and its political subdivisions (as defined in IC 36-1-2-13) are not liable for prejudgment interest).

Sec. 6. This chapter does not prevent a court from awarding prejudgment interest in a civil action based on contract.

SECTION 2. This act does not apply to actions that arise before September 1, 1984.

<sup>122</sup>See, e.g., ALASKA STAT. §§ 45.45.010 (Supp. 1983), 09.50.280 (1973); COLO. REV. STAT. § 13-21-101(1) (Supp. 1983); OHIO REV. CODE ANN. § 1343.03 (Page Supp. 1982); R.I. GEN. LAWS § 9-21-10 (Supp. 1983); UTAH CODE ANN. §§ 15-1-4, 78-27-44 (1977).

<sup>123</sup>See, e.g., TENN. CODE ANN. § 47-14-123 (1979); W. VA. CODE § 56-6-31 (Supp. 1983).

<sup>124</sup>See, e.g., IOWA CODE ANN. § 535.3 (West Supp. 1983-84); LA. REV. STAT. ANN. § 13:4203 (West 1968); ME. REV. STAT. ANN. tit. 14, § 1602 (Supp. 1983-84); MASS-GEN.

seems the most equitable in light of the policy of preventing a party from benefiting from delay.<sup>125</sup> If a plaintiff's suffering the loss of the use of his money as a result of delay caused by the defendant's refusal to negotiate is unfair, then holding a defendant liable for prejudgment interest for a time period before the plaintiff has summoned the defendant to the negotiating table is equally unfair. Therefore, a defendant should not be liable for interest accruing before the complaint is filed.<sup>126</sup>

### B. Mandatory or Discretionary Award

In explicit terms, the Indiana Supreme Court announced in *Roper* that when an award is due for prejudgment interest in a property loss case, it should be as a matter of right, not at the jury's discretion.<sup>127</sup> "The law dispenses no favors, and jurors should mete out equal and exact justice, and should not have the right to allow or refuse interest as one of the elements of just compensation . . . ."<sup>128</sup> The *Roper* rationale is equally pertinent to an award for personal injury loss. In recognition of this principle, Indiana should join the majority of the states which have mandatory prejudgment interest statutes.<sup>129</sup>

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LAWS ANN. ch. 231, § 6B (West Supp. 1984-85); MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84); NEV. REV. STAT. § 17.130 (1981); N.H. REV. STAT. ANN. § 524:1-b (1974); N.C. GEN. STAT. § 24-25 (Supp. 1983); OKLA. STAT. ANN. tit. 12, § 727(2) (West Supp. 1983-84).

<sup>125</sup>See *supra* notes 78-83 and accompanying text. See also Comment, *Availability of Prejudgment Interest in Personal Injury and Wrongful Death*, 16 U.S.F.L. REV. 325, 341-46 (1982).

<sup>126</sup>Indiana's Engrossed S. 141, *supra* note 121 at § 2, offered a hybrid accrual date wherein the interest accrues one year after the cause of action arose. This arbitrary point of accrual will unfairly allow plaintiffs who file a complaint after one year to collect interest before the complaint was filed, yet plaintiffs who file a complaint before one year cannot recover prejudgment interest for the period between date of filing until one year from the date of the cause of action. Although this hybrid accrual date is an improvement over the wholly discretionary accrual date of the 1983 Senate Bill 366, *supra* note 120, the most equitable date would be the date on which the complaint was filed.

<sup>127</sup>New York, C. & St. L. Ry. v. *Roper*, 176 Ind. 497, 509, 96 N.E. 468, 473 (1911); see also C. McCORMICK, *supra* note 13, § 55, at 221 ("A rule, however, which leaves the award of this important element of compensation to the unbridled caprice of the jury, in cases where a fairly measurable sum has been withheld from plaintiff, seems hard to support.").

<sup>128</sup>*Roper*, 176 Ind. at 509, 96 N.E. at 473. See also *Fort Wayne Nat'l Bank v. Scher*, 419 N.E.2d 1309, 1311-12 (Ind. Ct. App. 1981).

<sup>129</sup>See, e.g., ALASKA STAT. §§ 45.45.010 (Supp. 1983), 09.50.280 (1973); CAL. CIV. CODE § 3291 (West Supp. 1984); COLO. REV. STAT. § 13-21-101 (Supp. 1983); GA. CODE § 51-12-14 (1982); IOWA CODE ANN. § 535.3 (West Supp. 1983-84); LA. REV. STAT. ANN. § 13:4203 (West 1968); ME. REV. STAT. ANN. tit. 14, § 1602 (Supp. 1983-84); MASS. GEN. LAWS ANN. ch. 231, § 6B (West Supp. 1984-85); MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84); NEV. REV. STAT. § 17.130 (1981); N.H. REV. STAT. ANN. § 524:1-b (1974); N.C. GEN. STAT. § 24-5 (Supp. 1983); OKLA. STAT. ANN. tit. 12, § 727(2) (West Supp. 1983-84); R.I. GEN. LAWS § 9-21-10 (Supp. 1983); UTAH CODE ANN. §§ 15-1-4

Mandatory awards would assure consistency in plaintiffs' compensation and encourage settlement by eliminating any economic incentive for a defendant to postpone settlement negotiations.<sup>130</sup> Therefore, both plaintiffs and defendants could benefit from the predictability of judgments, and crowded court dockets would be relieved by the increase of serious settlement endeavors, especially in cases where liability is indisputable.

### C. *Types of Damages to Which Statute Applies*

A statute should enumerate the types of damages which are eligible for prejudgment interest. Although most statutes mandate interest on the entire judgment,<sup>131</sup> this often results in overcompensation for the plaintiff. Exemplary damages, for example, should not be included, as the purpose of exemplary damages is punishment for the defendant, not compensation for the plaintiff.<sup>132</sup> Awarding prejudgment interest on punitive damages would result in overcompensation or a windfall for the plaintiff and an excessive penalty for the defendant.<sup>133</sup>

Another consideration is whether to allow prejudgment interest for future damages such as loss of future earning capacity and future medical expenses. Although most jurisdictions award interest on the entire judgment,<sup>134</sup> the plaintiff is overcompensated when prejudgment interest is awarded on future losses such as earning capacity and future medical expenses, for the plaintiff has not lost the use of that money as of the date of the judgment.<sup>135</sup> Therefore, future losses should not be included in the prejudgment interest calculation as the purpose of prejudgment interest is to compensate for the lost use of money.<sup>136</sup>

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(1977), 78-27-44 (1977); WIS. STAT. ANN. § 807.01(4) (West Supp. 1983-84). Some states, however, have discretionary statutes. See, e.g., HAWAII REV. STAT. § 636-16 (Supp. 1983); MD. CTS. & JUD. PROC. CODE ANN. § 11-301 (Supp. 1983); OHIO REV. CODE ANN. § 1343.03 (Page Supp. 1982); TENN. CODE ANN. § 47-14-123 (1979).

<sup>130</sup>See *supra* notes 85-87 and accompanying text.

<sup>131</sup>See *supra* note 129 and accompanying text (all states with mandatory statutes allow prejudgment interest on the entire judgment with the exception of Massachusetts (limited to pecuniary and consequential damages); Nevada (not allowed on future damages); North Carolina (only on compensatory damages); and Utah (special damages only)). Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess., 84 (1984) specifically denies prejudgment interest on punitive damages.

<sup>132</sup>See *Roper*, 176 Ind. at 510, 96 N.E. at 473; C. MCCORMICK, *supra* note 13, at 227; Comment, *supra* note 125, at 355.

<sup>133</sup>See Comment, *Survey*, *supra* note 19, at 210 n. 103, ¶ 2.

<sup>134</sup>See *supra* note 131.

<sup>135</sup>See NEV. REV. STAT. § 17.130 (1981) (prejudgment interest not allowed on future damages). But see *Carlton v. H.C. Price Co.*, 640 F.2d 573 (5th Cir. 1981) (awarding prejudgment interest on future medical damages); *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571 (1973), *appeal dismissed*, 414 U.S. 1106 (1973).

<sup>136</sup>See *supra* notes 70-77 and accompanying text.

Although the trend with recent legislation is to allow prejudgment interest on all losses,<sup>137</sup> there are two strong arguments against awarding prejudgment interest on non-pecuniary losses such as pain and suffering.<sup>138</sup> First, damages for non-pecuniary losses do not constitute compensation for loss in the traditional sense of making the plaintiff whole or replacing his loss,<sup>139</sup> because pain and suffering cannot be measured in dollars or eliminated by the payment of money. Second, the jury's awards are arbitrary, as there is no market value on these losses, and an award of prejudgment interest would result in undue compensation.<sup>140</sup> Both arguments have merit when one looks to the policy of providing fair compensation to the plaintiff.<sup>141</sup> Fair, not excessive, compensation is the objective of prejudgment interest.

Granting an award of prejudgment interest which unjustly enriches the plaintiff, by allowing him interest on money of which he has not lost the use, would simply be trading the current injustice where the defendant is unjustly enriched by being allowed to benefit from the use of the plaintiff's money for a new injustice. An award on the total judgment, including non-pecuniary losses, would be as unfair as denying prejudgment interest on the entire judgment. To achieve just compensation, a compromise is appropriate.<sup>142</sup>

However, the division of damages for the purpose of awarding prejudgment interest will affect the policy consideration of promoting settlement. Limiting prejudgment interest to pecuniary losses such as lost wages and medical expenses will necessarily reduce the defendant's liability for interest and, consequently, prejudgment interest will not provide as much incentive for the defendant to avoid delay and negotiate a set-

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<sup>137</sup>Rand Note, *supra* note 21, at 1; *see supra* note 131. *But see* MASS. GEN. LAWS ANN. ch. 231, § 6B (West Supp. 1984-85) and R.I. GEN. LAWS § 9-21-10 (Supp. 1983) (allowing prejudgment interest only on pecuniary losses).

<sup>138</sup>Professor McCormick defines pecuniary loss as loss from injury which can be measured in money by a standard, whereas non-pecuniary loss such as pain and suffering and mental anguish cannot be measured by a standard of valuation. C. McCORMICK, *supra* note 13, §§ 56-57, at 224-26. For commentary supporting allowing prejudgment interest only on pecuniary losses, *see* C. McCORMICK, *supra* note 13, § 56; Note, *supra* note 18, at 161 ("segregate pecuniary from nonpecuniary and . . . award damages on the former."); Comment, *Prejudgment Interest: An Element of Damages Not to be Overlooked*, 8 CUM. L. REV. 521, 535 (1977). *Contra* State v. Phillips, 470 P.2d 266, 273-74 (Alaska 1970) ("All damages, then . . . should carry interest.").

<sup>139</sup>*See* D. DOBBS, *supra* note 1, § 8.1, at 544-45.

<sup>140</sup>*Id.*

<sup>141</sup>*Contra* Comment, *supra* note 125, at 341-46.

<sup>142</sup>*See* Feirich, *Pre-Judgment Interest or Conflict of Interest*, 71 ILL. B. J. 526 (1983) (where the president of the Illinois State Bar Association discusses the association's draft legislation which offered to the legislature a compromise position similar to the one advocated in this Note). For an in depth view of the Illinois debate over prejudgment interest, *see* Londrigan, *Prejudgment Interest The Case For . . .*, 72 ILL. B.J. 62 (1983) and Smith, *The Case Against . . .*, 72 ILL. B.J. 63 (1983).

tlement. The legislature, therefore, must weigh the divergent effect of two policies—just compensation and promotion of settlement—in determining whether to allow interest on the non-pecuniary damages.

Although dividing an award into pecuniary and non-pecuniary damages, punitive damages, and future losses requires some computations, this need not be an overburdening complexity for the juries.<sup>143</sup> Instead of returning a general verdict, the jury could be instructed to complete a form distinguishing the amounts awarded for non-pecuniary and pecuniary losses, and past and future damages.<sup>144</sup> The court could then assess the interest to the appropriate damages, or the jury could be instructed to assess the interest.

#### *D. Effect of Settlement Offer*

Because promoting settlement is a major policy consideration in the allowance of prejudgment interest, some states' statutes include contingencies regarding the offer of settlement.<sup>145</sup> Some require that the award obtained must be equal to or greater than previous settlement offers before prejudgment interest is allowed for the entire period before final judgment.<sup>146</sup> Such a contingency would require that the plaintiff, too,

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<sup>143</sup>Both courts and legislatures have likely been concerned with the calculation involved in dividing the damages for computing prejudgment interest. This concern may be partially responsible for many legislatures awarding prejudgment interest on the entire judgment. As Professor McCormick noted, "[d]oubtless, due to a fear that undue complexity in instructions to juries, and excessive intricacies of calculation might be called for, courts have been slow thus to analyze damages in personal injury cases into their component parts and authorize interest in some and not in others." C. MCCORMICK, *supra* note 13, § 56, at 225. As juries must necessarily do calculations to arrive at any award and since modern technology has made the calculator a commonplace aid, dividing an award should cause minimal computation difficulty.

<sup>144</sup>Courts now return general verdicts pursuant to IND. R. TR. P. 49 which abolished special verdicts. However, the court could furnish a form similar to that which the legislature described in the Comparative Fault Act, Act of Apr. 21, 1983, Pub. L. No. 317-1983, Sec. 1, § 6, 1983 Ind. Acts 1930, 1933 (codified at IND. CODE § 34-4-33-6 (Supp. 1984) which provides that:

The court shall furnish to the jury forms of verdicts that require the disclosure of:

- (1) The percentage of fault charged against each party; and
- (2) The calculations made by the jury to arrive at their final verdict.

If the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of the verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty.

<sup>145</sup>See *infra* note 146.

<sup>146</sup>See, e.g., CAL. CIV. CODE § 3291 (West Supp. 1984) (interest calculated from date of plaintiff's written offer if plaintiff receives a more favorable verdict than that offer); GA. CODE § 51-12-14 (1982) (plaintiff gives defendant a written offer; if not paid by defendant within thirty days, plaintiff gets interest from date of offer if award is equal to or greater than that offer); PA. R. CIV. P. 238, § 231, (award must be greater than 125% of offer or interest accrues only to date of offer); WIS. STAT. ANN. § 807.01(4)

make a good faith effort to settle if a reasonable offer were extended by the defendant. If a plaintiff refuses a reasonable, legitimate offer of settlement, perhaps he should be denied recovery of prejudgment interest, for the plaintiff should not benefit from delaying the litigation or holding out for a higher award any more than the defendant should benefit from delay. In fairness, the settlement promotion argument must cut both ways.

The most equitable solution is a moderate approach which tolls the accrual of prejudgment interest after the offer is made.<sup>147</sup> Indiana's Senate Bill 366, introduced in 1983, offered this alternative approach.<sup>148</sup> Interest accrual was tolled after a written offer of settlement by the defendant if the amount of the offer was "substantially identical to the amount of the judgment; or more favorable to the prevailing party than the judgment."<sup>149</sup> Although the Senate's alternative is an attractive one, the "substantially identical" language is vague and ambiguous, and invites incongruous awards of interest.<sup>150</sup> The use of "equal to or greater than" language would result in consistent awards and avoid trial courts' or juries' varying determinations of what amount is "substantially identical."

Although the 1984 Engrossed Senate Bill 141 defined the settlement offer in explicit terms, interest is totally prohibited if the defendant's offer was made within one hundred eighty days after the complaint was filed, if the offer included payment within sixty days after acceptance of the offer, and if the offer was at least eighty percent of the judgment amount.<sup>151</sup> The 1983 version, with a modification of the "substantially identical" language, is the more equitable proposal.

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(West Supp. 1983-84) (interest allowed if plaintiff recovers a judgment greater than the offer of settlement).

<sup>147</sup>See, e.g., MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84) (interest may be tolled after date of offer if offer was equal to or greater than judgment); cf. IND. R. TR. P. 68 ("If the judgment finally obtained by the offeree is not more favorable than the offer, [offer must be made by the defendant more than ten days before the trial begins] the offeree must pay the costs incurred after the making of the offer.").

<sup>148</sup>See the text of S. 366, ch. 2, § 3 at *supra* note 120.

<sup>149</sup>S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess., § 3 (1983). However, this section failed to specify a particular time within which the offer must be made. IND. R. TR. P. 68, *supra* note 146, requires that the offer be made ten days before trial. Such a provision could be included in a prejudgment interest statute.

<sup>150</sup>The "substantially identical" language opens a range of considerations which require unwarranted judicial discretion which will result in inconsistent awards among similarly-situated plaintiffs. How will the court determine what is substantially similar? Percentages? Dollar amounts? Is one percent variance substantially identical? On a \$3,000 judgment that would amount to only \$30, whereas if the court were considering a \$1 million award, one percent would amount to \$10,000. If one percent is not substantial, where should the line be drawn? Five percent? Ten percent? The courts will likely disagree on this line drawing, and plaintiffs, consequently, will be subject to uncertain judgments.

<sup>151</sup>See *supra* note 121; cf. PA. R. CIV. P. 238, § 231 (wherein interest is tolled after the date of offer).

In weighing the importance of the policy of promoting settlement, the legislature should carefully consider the various contingency alternatives that are available.

### *E. Rate of Interest*

Most statutes award interest on tort actions at a fixed rate of interest<sup>152</sup> while a few allow a discretionary rate with a maximum rate defined.<sup>153</sup> Even though only one state has adopted an indexed rate of interest,<sup>154</sup> a "floating" rate of interest would assure that rates awarded reflect current market rates as they would be indexed to an economic activity. Indiana's House Bill 1974 proposed that interest be indexed at six-month intervals based on treasury bills.<sup>155</sup> A floating rate is probably the most equitable interest alternative, but a fixed rate would be preferable to the discretionary rate proposed by Senate Bill 366 in 1983,<sup>156</sup> or the six to twelve percent range proposed by 1984's Engrossed Senate Bill 141.<sup>157</sup> There is no justification for similarly-situated plaintiffs' receiving interest calculated at different rates. Therefore, in drafting a prejudgment interest statute, the legislature should explicitly set interest rates, so the courts will not calculate awards at their discretion, resulting in indiscriminate variations in plaintiffs' compensation.<sup>158</sup>

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<sup>152</sup>See, e.g., CAL. CIV. CODE § 3291 (West Supp. 1984); IOWA CODE ANN. § 535.3 (West Supp. 1983-84).

<sup>153</sup>See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 11-301 (Supp. 1983); TENN. CODE ANN. § 47-14-123 (1979). See also Engrossed S. 141, *supra* note 121, which is unusual because it offers a range, i.e. a floor of 6% and a ceiling of 12%.

<sup>154</sup>DEL. CODE ANN. tit. 6, § 2301 (Supp. 1982) (interest rate 5% over the Federal Reserve discount rate).

<sup>155</sup>See H. 1974, § 6 (adding IC 34-2-22.5-1) 103d Ind. Gen. Ass., 1st Reg. Sess. (1983). Section 1(b) provides that:

To establish the rate of interest to be applied, the director of the department of financial institutions shall identify the average annual yield on twenty-six (26) week term treasury bills, as reported by the United States Federal Reserve Board, and shall round that figure to the nearest one-quarter percent (0.25%).

<sup>156</sup>See the text of S. 366, ch. 2, § 4 at *supra* note 120. The provision for the interest rate would allow courts to vary the interest rate as long as the rate did not exceed the twelve percent (12%) rate set by IND. CODE § 24-4.6-1-101 (1982).

<sup>157</sup>See *supra* note 152.

<sup>158</sup>For a contrary view, see Keir & Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39 BUS. LAW 129 (1983) where the authors propose that awards of prejudgment interest be based on opportunity cost to the injured party rather than by a static, inflexible rule and that, in addition, the rates be compounded. The proposal offers two calculation provisions: (1) For business entities, the opportunity cost can be calculated within a range where the minimum award would be the company's cost of capital and where the maximum would be calculated on the company's historical rate of return, if higher. (2) For individuals, the opportunity costs can be calculated at the rate of a low-risk, liquid investment such as money market instruments or treasury bills and, if higher, the maximum rate would

Ordinarily, prejudgment interest is not compounded.<sup>159</sup> Indiana follows the majority rule and currently does not allow compound interest, that is, interest on interest, when prejudgment interest is awarded.<sup>160</sup>

Determining the date of accrual, deciding on a mandatory or discretionary approach, defining types of damages eligible for interest, and setting the rate of interest to be awarded are the foremost considerations in drafting a prejudgment interest statute. Finally, the legislature may also want to consider whether the state, when a defendant in a personal injury suit, is subject to prejudgment interest.<sup>161</sup>

## VI. CONCLUSION

Limited legislation and ambiguous standards in judicial interpretation of the common law have produced inequitable judgments for plaintiffs in the recovery of prejudgment interest in Indiana. Personal injury litigants have suffered the ultimate injustice, for the entire class has been totally barred from recovery of prejudgment interest on any damages under all circumstances.

Case law is devoid of thoughtful analysis or sound reasoning in barring the personal injury claimant from full and just compensation for his damages. Since full and fair compensation for the plaintiffs should be the focus in an analysis of prejudgment interest, the courts' emphasis on the defendant and the courts' adherence to the ambiguous

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be the greater of the individual's historical return on investments or the average yield of a mutual fund including dividends. *Id.* at 152.

<sup>159</sup>See D. DOBBS, *supra* note 1, at 164. *But see* COLO. REV. STAT. § 13-21-101(1) (Supp. 1983) (calculation shall include compound interest from the date suit filed); MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1983-84) (compound interest included from date complaint filed until judgment satisfied); Comment, *Survey, supra* note 19, at 218 (proposing that "[c]ourts should uniformly give *compound* interest for the prejudgment period.").

<sup>160</sup>*Indiana Tel. Corp. v. Indiana Bell Tel. Co.*, 171 Ind. App. 616, 641, 360 N.E.2d 610, 613 (1977) (holding that interest could not be compounded by figuring interest on the award of interest as damages); *see* Engrossed S. 141 at Sec. 3, *supra* note 121, which requires awards to be simple interest.

<sup>161</sup>Some states do not hold the government liable for prejudgment interest when the government is a defendant. *See, e.g.*, CAL. CIV. CODE § 3291 (West Supp. 1984); CIV. PRAC. RULES GOVERNING COURTS OF THE STATE OF N.J., Rule 4:42-11(b); *see also*, S. 366, 103d Ind. Gen. Ass., 1st Reg. Sess. § 1 (1983) (proposing exclusion of the state or any other governmental entity from prejudgment interest) and Engrossed S. 141, 103d Ind. Gen. Ass., 2d Reg. Sess., § 5 (1984) (excluding the state and its political subdivisions). *See also Tort Law: State Immune From Prejudgment Interest Statute*, 17 SUFFOLD U.L. REV. 473 (1983) (where the judiciary refused to construe the statute waiving the State's immunity in tort as extending liability for prejudgment interest to the state and indicated that rendering the state liable for prejudgment interest was a legislative, not judicial, function).

"ascertainable sum" standard create injustice for personal injury claimants. In recognition of this injustice, the courts could apply the ascertainable damages prerequisite in personal injury suits and allow prejudgment interest on pecuniary losses which are ascertainable before trial.

The more appropriate solution to the inequity in the law, however, would be enactment of a mandatory prejudgment interest statute by the Indiana legislature. A legislative mandate would accomplish dual goals of providing just compensation for the plaintiff and encouraging defendants to settle meritorious claims. The Indiana legislature showed a willingness to address this problem in 1983 and 1984 even though the prejudgment interest bills introduced were unsuccessful.

Full compensation should include prejudgment interest on all pecuniary losses incurred between the date the complaint is filed and the date of judgment. Future damages and exemplary damages should not be included in the interest computation. If the primary policy for giving prejudgment interest is just compensation for the plaintiff, then non-pecuniary losses should also be excluded from the interest calculations as those awards are inherently arbitrary and cannot be assigned a market value. On the other hand, if the major policy consideration is settlement promotion, interest on those damages would provide an increased incentive for the defendant to make a good faith effort to settle.

By weighing the policy considerations, the Indiana legislature can reach a fair compromise by which the plaintiff will be justly compensated yet will not receive the windfall which results from awarding interest on the entire judgment.

MITZI H. MARTIN

## Taking Roe to the Limits: Treating Viable Feticide as Murder

### I. INTRODUCTION

The Kentucky Supreme Court recently ruled that the intentional, nonconsensual destruction of a viable fetus did not constitute murder.<sup>1</sup> In *Hollis v. Commonwealth*,<sup>2</sup> the defendant allegedly took his estranged wife behind the barn of his parents' house, told her he did not want the baby she was carrying, and forcibly attacked the fetus *in utero* with his hand. The seven-month-old fetus was delivered stillborn; the mother's uterus and vagina were severely damaged.

The Kentucky Supreme Court held that the defendant's conduct did not constitute murder because the applicable statute<sup>3</sup> employed the term "person" in describing the victim.<sup>4</sup> The court reasoned that, at common law, a fetus was not considered a person for the purposes of homicide because the term "person" applied to a human entity which had been born alive. Because Kentucky's murder statute did not give the term any other meaning, the common law definition applied.<sup>5</sup>

Almost all jurisdictions<sup>6</sup> have unlawful abortion or manslaughter-type statutes<sup>7</sup> that encompass acts such as those in *Hollis*. Unfortunately, the penalties that may be imposed under these statutes<sup>8</sup> are often substantially less severe than those available for murder.<sup>9</sup> For example, the court in *Hollis* noted that the defendant could have been convicted under Kentucky's unlawful abortion statute,<sup>10</sup> which carries a maximum penalty of twenty years imprisonment. Hollis could have faced life imprisonment or death had he been convicted of murder.<sup>11</sup>

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<sup>1</sup>*Hollis v. Commonwealth*, 652 S.W.2d 61, 65 (Ky. 1983).

<sup>2</sup>652 S.W.2d 61 (Ky. 1983).

<sup>3</sup>KY. REV. STAT. § 507.020 (1976).

<sup>4</sup>652 S.W.2d at 64.

<sup>5</sup>*Id.* at 63-64.

<sup>6</sup>The three possible exceptions are Alaska, Hawaii, and New Jersey. While Hawaii and New Jersey do not have unlawful abortion statutes at this time, Alaska's unlawful abortion statute specifically excludes the viable fetus. ALASKA STAT. § 18.16.010 (1981). Furthermore, none of these jurisdictions specifically cover viable feticide under any of their homicide statutes.

<sup>7</sup>See *infra* notes 138-40 and accompanying text.

<sup>8</sup>See *infra* note 142 and accompanying text.

<sup>9</sup>See *infra* note 141 and accompanying text.

<sup>10</sup>652 S.W.2d at 65. The Kentucky unlawful abortion statute is codified at KY. REV. STAT. § 311.750 (1975). The penalty for violating the unlawful abortion statute is imprisonment for at least ten years and no more than twenty years. KY. REV. STAT. § 311.990 (1975).

<sup>11</sup>Under Kentucky law, murder is a Class A felony. In six statutorily-defined situations, however, murder is a capital offense. KY. REV. STAT. § 507.020 (1976). The penalty for

Only three states have explicitly attempted to include the viable fetus as a potential murder victim.<sup>12</sup> The vast majority of remaining jurisdictions use "person,"<sup>13</sup> "human being,"<sup>14</sup> or similar terms<sup>15</sup> to describe the victim or to classify the crime of murder. The use of these terms, without statutory definition to the contrary<sup>16</sup> and alternative treatment of viable feticide under other statutes,<sup>17</sup> compels courts to apply the born alive rule in viable feticide cases brought under murder statutes. Legislative action is necessary to abolish this criminal law rule that is obsolete and inconsistent with property and tort law.

The common law born alive rule was based on the limited medical technology and concepts<sup>18</sup> of the era that spawned it. The medical basis of the rule is evident from its application. Property law, which is not dependent upon medical technology, did not apply the born alive rule and protected fetal inheritance rights even at common law.<sup>19</sup> In contrast, criminal and tort law are highly dependent upon medical knowledge. Common law courts developed the born alive rule in response to the period's limited knowledge of fetal development and held that the fetus could not be a potential murder victim.<sup>20</sup> Wrongful death actions did not exist at common law, and knowledge of fetal development was still limited when statutes allowing the tort were enacted. Consequently, early decisions brought under these statutes denied recovery for the death of a stillborn fetus by applying the born alive rule.<sup>21</sup>

Tremendous advancements in prenatal medicine have occurred since the common law period and the enactment of wrongful death statutes. Tort law has recognized these advancements and recovery for the *in utero* death of a viable fetus is now allowed in a majority of jurisdictions.<sup>22</sup>

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the commission of a Class A felony is not fewer than twenty years or more than life imprisonment. KY. REV. STAT. § 532.060(2)(a) (1976). The death penalty is authorized for one convicted of a capital offense. KY. REV. STAT. § 532.030(1) (1976).

<sup>12</sup>See *infra* notes 149-60 and accompanying text.

<sup>13</sup>See *infra* note 125.

<sup>14</sup>See *infra* note 130.

<sup>15</sup>See *infra* note 127.

<sup>16</sup>Several states explicitly define these terms according to the born alive rule. See *infra* note 123 and accompanying text.

<sup>17</sup>Alternative treatment under other statutes creates an obstacle to expanding judicially the murder statute to include the viable fetus under the rules of statutory construction. See *infra* notes 144-46 and accompanying text.

<sup>18</sup>Religious and philosophical concepts of the common law period may have also aided in creation of the born alive rule. For a discussion of this proposition, see Means, *The Law of New York Concerning Abortion and Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411-15 (1968); Note, *The Unborn Child: Consistency in the Law?*, 2 SUFFOLK U.L. REV. 228, 229 (1968).

<sup>19</sup>Note, *supra* note 18, at 230.

<sup>20</sup>*Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

<sup>21</sup>See *infra* note 52 and accompanying text.

<sup>22</sup>See *infra* notes 104-05 and accompanying text.

Criminal law, however, has failed to recognize the obsolescence of the born alive rule and continues to deny the viable fetus status as a potential murder victim.<sup>23</sup>

The inclusion of the viable fetus under wrongful death statutes has primarily been a judicial accomplishment.<sup>24</sup> Courts, however, do not have as much freedom to expand criminal law because of statutory construction rules<sup>25</sup> and due process concerns.<sup>26</sup> This Note proposes that legislatures abolish the common law born alive rule as obsolete and inconsistent with property and tort law. Further, this Note examines the issues legislatures will face in drafting murder statutes that include the viable fetus as a potential victim. For example, wording and placement of the statute within a criminal code may be important to judicial acceptance. Viability must be carefully defined in order to avoid void-for-vagueness problems. Equal protection and quality of life concerns are important in deciding whether to include consensual as well as nonconsensual viable feticide. Finally, legislatures will have to decide whether to protect the viable fetus against all forms of criminal attack as opposed simply to including it under the murder statute. Following a discussion of these issues and suggested solutions, a proposed statutory scheme will be introduced.

## II. DEVELOPMENT AND APPLICATION OF THE BORN ALIVE RULE AT COMMON LAW

The common law development and application of the born alive rule reflects the period's medical uncertainty regarding prenatal life. While this uncertainty posed practical difficulties for fetal protection in criminal law, it presented no obstacle to protection of fetal property rights.

### A. *The Development and Necessity of the Born Alive Rule in Early Criminal Law*

During the European Middle Ages, all disciplines agreed that the infusion of a rational soul into the developing fetus occurred between conception and birth.<sup>27</sup> Termed "animation,"<sup>28</sup> the infusion was reflected in sufficient fetal development to detect movement.<sup>29</sup> While there was dispute as to exactly when animation occurred,<sup>30</sup> it was agreed that prior to animation the fetus was part of its mother so that its destruction was

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<sup>23</sup>See *infra* notes 122-29 and accompanying text.

<sup>24</sup>See *infra* notes 104, 143 and accompanying text.

<sup>25</sup>See *infra* notes 144-46 and accompanying text.

<sup>26</sup>See *infra* notes 147-48 and accompanying text.

<sup>27</sup>Means, *supra* note 18, at 411.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 412.

<sup>30</sup>*Roe v. Wade*, 410 U.S. 113, 134 (1973).

not considered homicide.<sup>31</sup> Whether the destruction of an animated fetus, later called a "quickened" fetus, was criminal in any form is still unclear.<sup>32</sup>

Thirteenth century common law apparently considered fetal destruction to be homicide "[i]f the foetus [were] already formed or quickened, especially if it [were] quickened."<sup>33</sup> In a fourteenth century case involving prenatal injury to twins, one born dead and the other born alive but dying shortly thereafter, however, it was held that no felony had been committed.<sup>34</sup> An intermediate position had evolved by the seventeenth century. As enunciated by Sir Edward Coke, the intermediate position has since been accepted as that of the common law:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison,[<sup>35</sup>] and no murder: but if the child be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable[<sup>36</sup>] creature, *in rerum natura*, when it is born alive.<sup>37</sup>

The born alive rule has been attributed to two particular limitations in medical expertise during the common law period.<sup>38</sup> First, the medical profession thought it was impossible to determine whether the fetus was capable of independent existence until that capability was actually demonstrated. Absent even a capability to exist independently, the unborn child was considered to be a part of its mother with no life of its own to be destroyed.<sup>39</sup> Second, the common law medical profession could not determine with adequate certainty the cause of fetal death.<sup>40</sup> This destroyed the requisite causation element: proving that the death of the fetus was the result of the defendant's acts. These medical limitations posed practical difficulties which necessitated the born alive rule for criminal law purposes.

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<sup>31</sup>*Id.*

<sup>32</sup>*Id.*

<sup>33</sup>2 H. BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND, 341 (S. Thorne trans. 1968).

<sup>34</sup>Winfield, *The Unborn Child*, 8 CAMBRIDGE L.J. 76, 78 (1944) (citing Y.B. Mich. 1 Ed. III, f. 23, pl. 18; 3 Lib. Ass. pl. 2).

<sup>35</sup>It is unclear exactly what the term "misprison" meant. Most American courts equate the term with "misdemeanor." See Means, *supra* note 18, at 420.

<sup>36</sup>During the middle ages, the fetus was considered a rational being prior to live birth. See *supra* text accompanying note 27.

<sup>37</sup>3 E. COKE, INSTITUTES 50 (1817) (footnote omitted).

<sup>38</sup>Note, *supra* note 18, at 229.

<sup>39</sup>Roe v. Wade, 410 U.S. 113, 134 (1973).

<sup>40</sup>Winfield, *supra* note 34, at 90.

*B. Fetus Considered to Be Born in Property Law: Medical Technology Irrelevant to Exercising Property Rights*

The born alive rule was not applied to fetal property rights at common law. According to Blackstone, the fetus was considered actually to be born for many purposes in property law, including inheritance.<sup>41</sup>

While some commentators attribute fetal inheritance rights to the testator's intent rather than to the personhood of the fetus,<sup>42</sup> this does not seem to be the position taken by the common law courts. In 1798 an English court stated: "Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of *other persons*."<sup>43</sup> One commentator has reconciled the common law's treatment of fetal inheritance rights with the criminal born alive rule by suggesting that the property right only attached at conception but did not vest until live birth had occurred.<sup>44</sup> Although this position has support,<sup>45</sup> American courts following the common law approach have held that the right of inheritance vested upon the testator's death rather than upon the child's birth.<sup>46</sup> "It has been the uniform and unvarying decision of all common law courts in respect of estate matters for a least the past two hundred years that a child *en ventre se mere* is 'born' and 'alive' for all purposes for his benefit."<sup>47</sup>

The common law's disparate treatment of the fetus in property and criminal law can be viewed as a result of the different roles medical technology played in those two areas. A murder conviction requires that the prosecution prove that a *death* has occurred as a *result* of the defendant's acts. Because the common law considered the fetus to be part of the mother, without a separate life, death before live birth was conceptually impossible. Furthermore, limitations in medical technology made it impossible to determine that the fetal destruction was the result of the defendant's actions. In contrast, the protection of property rights does not depend upon medical conceptions of separate life and the ability to determine cause of death. The ability to exist independently is not the

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<sup>41</sup>Note, *The Law and The Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 351 (1971) (citing W. BLACKSTONE, COMMENTARIES 130 (1962)).

<sup>42</sup>E.g., N. SHAW, C. DAMME, LEGAL STATUS OF THE FETUS, GENETICS AND THE LAW, (A. Milunsky, F. Annas, eds. 1976).

<sup>43</sup>*Thellusson v. Woodford*, 4 Ves. Jun. 227, 323, 31 Eng. Rep. 117, 164 (1798) (emphasis added).

<sup>44</sup>See, e.g., Doudera, *Fetal Rights? It Depends.*, 18 TRIAL 38, 39 (April 1982).

<sup>45</sup>See *Roe v. Wade*, 410 U.S. 113, 162 (1973). The Court stated that the perfection of fetal property rights was generally made contingent upon live birth. The Court, however, did not cite any authority for this broad proposition. See *id.*

<sup>46</sup>E.g., *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907).

<sup>47</sup>*In re Holthausen's Will*, 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (Surrogate's Ct. 1941) (citation omitted).

key to exercising property rights; those rights can be exercised by a parent or guardian ad litem. Moreover, the cause of death is irrelevant to a determination of the decedent's property rights. Absent these practical medical difficulties, the born alive rule was unnecessary and the common law developed rules which protected fetal property rights.

### III. FROM COMMON LAW TO *Roe*: THE RISE OF WRONGFUL DEATH AND ANTIABORTION LEGISLATION

Until 1800, the status of the fetus in civil and criminal law was settled. During the 1800's, however, the states enacted wrongful death and anti-abortion legislation. Under these statutes, protecting the fetus from destruction once again became an issue.

#### A. *Wrongful Death Prior to Roe: Early Recognition of the Born Alive Rule's Obsolescence*

Wrongful death actions did not exist at common law,<sup>48</sup> and statutes allowing tort recovery for death were not enacted until the Civil War period.<sup>49</sup> After the enactment of these statutes, remedies for tortious prenatal death became an issue. Similar to homicide, wrongful death recovery is highly dependent upon medical technology. Both require proof that a death occurred as the result of the defendant's acts.<sup>50</sup> If the fetus is considered part of the mother, without separate life, its destruction cannot be considered death—an essential element is missing. Furthermore, if the medical profession cannot determine that the death was the result of the defendant's acts, the element of causation is missing.

The treatment of the fetus under wrongful death statutes from the period of their enactment until *Roe v. Wade*<sup>51</sup> suggested a trend for courts to apply the born alive rule in tort law only when the medical basis for it remained relevant. Early cases denied recovery on the ground that the fetus was part of the mother.<sup>52</sup> Later decisions, however, began to recognize that modern medical technology had demonstrated that the fetus was capable of independent existence prior to live birth. Consequently, these later cases allowed recovery.<sup>53</sup> Implicit in the decisions allowing recovery was the acceptance that causation could be proven.<sup>54</sup> By 1973,

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<sup>48</sup>*Baker v. Bolton*, 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

<sup>49</sup>Kader, *The Law of Tortious Prenatal Death Since Roe v. Wade*, 45 Mo. L. REV. 639, 642 (1980).

<sup>50</sup>*Dietrich v. Northampton*, 138 Mass. 14, \_\_\_\_ N.E. \_\_\_\_ (1884). See also notes 39-40 and accompanying text.

<sup>51</sup>410 U.S. 113 (1973).

<sup>52</sup>Kader, *supra* note 49, at 647 (citing *Dietrich v. Northampton*, 138 Mass. 14, \_\_\_\_ N.E. \_\_\_\_ (1884)).

<sup>53</sup>Kader, *supra* note 49, at 646 n.29.

<sup>54</sup>Because causation is an essential element, it must be adequately proven before recovery may be allowed.

the year the Supreme Court decided *Roe v. Wade*,<sup>55</sup> state courts were split on whether parents could recover for the wrongful death of a stillborn viable fetus. Seventeen jurisdictions had allowed recovery<sup>56</sup> and twelve had denied recovery.<sup>57</sup>

### *B. Antiabortion Statutes: Legislative Attempts to Abolish the Born Alive Rule*

Prior to 1821, all American jurisdictions<sup>58</sup> followed the common law born alive rule and did not treat intentional *in utero* fetal destruction as a crime.<sup>59</sup> The first antiabortion legislation was passed in 1821.<sup>60</sup> By the time of the Civil War, antiabortion legislation had become pervasive.<sup>61</sup> Legislation of this type altered the born alive rule by treating intentional *in utero* feticide as a crime. Early statutes retained the quickening distinction by providing substantially lesser penalties for abortions performed before quickening,<sup>62</sup> but during the 1800's the quickening distinction largely disappeared.<sup>63</sup> When the Supreme Court decided *Roe v. Wade*<sup>64</sup>

<sup>55</sup>410 U.S. 113 (1973).

<sup>56</sup>*Simmons v. Howard Univ.*, 323 F. Supp. 529 (D.D.C. 1971) (applying District of Columbia law); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (Conn. Super. Ct. 1966); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *State v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959); *Fowler v. Woodward*, 224 S.C. 608, 138 S.E.2d 42 (1964); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967).

<sup>57</sup>*Bayer v. Suttle*, 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1972); *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968); *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); *Dietrich v. Northampton*, 138 Mass. 14, \_\_\_\_ N.E. \_\_\_\_ (1884); *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 50 N.W.2d 229 (1951); *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969); *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966); *Padillow v. Elrod*, 424 P.2d 16 (Okla. 1967); *Carroll v. Skloff*, 415 Pa. 47, 202 A.2d 9 (1964); *Durrett v. Owens*, 212 Tenn. 614, 371 S.W.2d 433 (1963); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969).

<sup>58</sup>England altered the born alive rule in 1803 with the passage of the Miscarriage of Women Act. 1803, 43 Geo. 3, ch. 58.

<sup>59</sup>Note, *Roe v. Wade and the Traditional Standards Concerning Pregnancy*, 47 TEMP. L.Q. 715, 724 (1974).

<sup>60</sup>The first state to pass antiabortion legislation was Connecticut. *Id.* (citing CONN. STAT. tit. 22 §§ 22, 14, 16 (1821)).

<sup>61</sup>*Roe v. Wade*, 410 U.S. at 113.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>*Id.*

the born alive rule had been largely abolished, to the extent that criminal penalties were available for intentional *in utero* feticide.<sup>65</sup> Few jurisdictions, however, imposed these penalties based on the newly recognized capacity of the fetus to maintain independent existence prior to live birth. Only four jurisdictions did not impose criminal penalties for abortions performed early in pregnancy.<sup>66</sup> Fourteen jurisdictions imposed criminal penalties regardless of when the abortion was performed, but provided substantially lesser penalties if the abortion was performed prior to when viability<sup>67</sup> was thought to occur.<sup>68</sup> Thirty-one jurisdictions imposed the same criminal penalty whether or not the fetus was capable of independent existence.<sup>69</sup>

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<sup>65</sup>As enunciated by Coke, *in utero* feticide was considered a "great misprison" or misdemeanor. See *supra* note 35 and accompanying text.

<sup>66</sup>In *Roe v. Wade*, the Supreme Court listed those state statutes as follows: ALASKA STAT. § 11.15.060 (1970); HAWAII REV. STAT. § 453-16 (Supp. 1971); N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1972-73); WASH. REV. CODE ANN. §§ 9.02.060 to 9.03.080 (Supp. 1972). 410 U.S. at 140 n.37.

<sup>67</sup>The term "viability" subjectively means the point at which the fetus achieves the capacity for independent existence, with or without artificial aid. Objectively, the term is harder to define. The Supreme Court has used "potential for survival" and "reasonable likelihood of survival." See *infra* notes 99-102 and accompanying text.

<sup>68</sup>According to the Supreme Court, the following state statutes, based on Model Penal Code § 230.3, imposed less severe penalties for abortions performed before the fetus was considered viable:

ARK. STAT. ANN. §§ 41-303 to 41-310 (Supp. 1971); CAL. HEALTH & SAFETY CODE §§ 25950-25955.5 (West Supp. 1972); COLO. REV. STAT. §§ 40-2-50 to 40-2-53 (Supp. 1967); DEL. CODE ANN. tit. 24, §§ 1790-1793 (Supp. 1972); 1972 Fla. Sess. Law Serv., 380-382; GA. CODE §§ 26-1201 to 26-1203 (1972); KAN. STAT. ANN. § 21-3407 (Supp. 1971); MD. ANN. CODE, art. 43, §§ 137-139 (1971); MISS. CODE ANN. § 2223 (Supp. 1972); N.M. STAT. ANN. §§ 40A-5-1 to 40A-5-3 (1972); N.C. GEN. STAT. § 14-45.1 (Supp. 1971); OR. REV. STAT. §§ 435.405 to 435.495 (1971); S.C. CODE ANN. §§ 16-82 to 16-89 (Law. Co-op. 1962 & Supp. 1971); VA. CODE §§ 18.1-62 to 18.1-62-3 (Supp. 1972).

410 U.S. at 140, n.37 (citation form altered).

<sup>69</sup>The Supreme Court noted that the following state statutes were similar to sections 1194, 1195, and 1196 of the Texas Penal Code which were under consideration in *Roe v. Wade*:

ARIZ. REV. STAT. ANN. § 13-211 (1956); 1972 Conn. Acts 1 (Spec. Sess.) (in 1972 Conn. Legis. Serv. 677 (West 1972)), and CONN. GEN. STAT. §§ 53-29, 53-30 (1968) (or unborn child); IDAHO CODE § 18-601 (1948); ILL. REV. STAT., ch. 38, § 23-1 (1971); IND. CODE § 35-1-58-1 (1971); IOWA CODE § 701.1 (1971); KY. REV. STAT. § 436.020 (1962); LA. REV. STAT. ANN. § 37-.1285(6) (West 1964) (loss of medical license) (but see § 14:87 (Supp. 1972) containing no exception for the life of the mother under the criminal statute); ME. REV. STAT. ANN., tit. 17, § 51 (1964); MASS. GEN. LAWS ANN., ch. 272 § 19 (West 1970) (using the term "unlawfully," construed to exclude an abortion to save the mother's life, *Kudish v. Bd. of Registration*, 356 Mass. 98, 248 N.E.2d 264 (1969); MICH. COMP. LAWS § 750.14 (1948); MINN. STAT. § 617.18 (1971); MO. REV. STAT. § 559.100 (1969); MONT. CODE ANN. § 94-401 (1969); NEB. REV. STAT. § 28-405 (1964); NEV. REV. STAT. § 200.220 (1967); N.H. REV. STAT. Ann. § 585:13 (1955);

#### IV. RECOGNIZING THE FREEDOMS OF *Roe v. Wade*

While the Supreme Court has identified constitutional limits on a state's ability to punish intentional feticide, these limitations only apply prior to the capability of the fetus to exist independently. A majority of states now treat the viable fetus as a person for civil purposes but not for criminal purposes. Legislative reform is needed to resolve this inconsistency.

##### A. *Roe v. Wade: Permission to Treat the Viable Fetus as a Person*

In *Roe v. Wade*<sup>70</sup> the Court struck down a Texas abortion statute<sup>71</sup> which prohibited all abortions, except those necessary to save the life of the mother.<sup>72</sup> The plaintiff, a pregnant woman, sought a declaratory judgment that the statute was unconstitutional. Four major interests were considered by the Court in determining the case: (1) the mother's right to privacy under the fourteenth amendment; (2) the unborn child's fundamental right to life under the fourteenth amendment; (3) the state's interest in protecting the health of the mother; (4) the state's interest in protecting the potential life of the fetus. The Court's resolution<sup>73</sup> of these issues is important in ascertaining the limits of permissible criminal protection of the fetus.

The first interest the Court considered was the mother's right to privacy. Within the penumbra of the fourteenth amendment's guarantee of liberty, the mother has a fundamental right to privacy in determining whether or not to bear a child.<sup>74</sup> The Court recognized the mother's right to privacy, but specifically refused to hold that it was absolute.<sup>75</sup> The mother's right had to be balanced against any compelling state interest.<sup>76</sup> The state asserted that the unborn, as "persons," have a fundamental

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N.J. STAT. ANN. § 2A:87-1 (West 1969) ("without lawful justification"); N.D. CENT. CODE §§ 12-25-01, 12-25-02 (1960); OHIO REV. CODE ANN. § 2901.16 (Page 1953); OKLA. STAT. ANN., tit. 21, § 861 (1972); PA. STAT. ANN., tit. 18, §§ 4718, 4719 (Purdon 1963) ("unlawful"); R.I. GEN. LAWS § 11-3-1 §§ 4718, 4719 (1963) ("unlawful"); R.I. GEN. LAWS § 11-3-1 (1969); S.D. COMP. LAWS ANN. § 22-17-1 (1967); TENN. CODE ANN. §§ 39-301, 39-302 (1956); UTAH CODE ANN. §§ 76-2-1, 76-2-2 (1953) VT. STAT. ANN. tit. 13, § 101 (1958); W. VA. CODE § 61-2-8 (1966); WIS. STAT. § 940.04 (1969); WYO. STAT. ANN. §§ 6-77, 6-78 (1957).  
410 U.S. at 118-19, n.2.

<sup>70</sup>410 U.S. 113 (1973).

<sup>71</sup>TEX. PENAL CODE ANN. §§ 1191 to 1194, 1196 (Vernon 1933).

<sup>72</sup>TEX. PENAL CODE ANN. § 1196 (Vernon 1933).

<sup>73</sup>For a discussion of alternative solutions available to the Court, see Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 BUFFALO L. REV. 107 (1982).

<sup>74</sup>410 U.S. at 153.

<sup>75</sup>*Id.*

<sup>76</sup>*Id.* at 154.

right under the fourteenth amendment not to be deprived of life without due process of law. The Court noted that such a finding would override the mother's right to privacy,<sup>77</sup> but held that the fetus had never been considered a person under the fourteenth amendment.<sup>78</sup> The Court specifically refused to answer the question whether or not life begins at conception.<sup>79</sup> Despite its determination that the fetus could not be considered a "person" under the fourteenth amendment, the Court found two state interests which, at some point in the gestation period, become compelling interests and override the mother's privacy right.<sup>80</sup>

The Court found the state acquired a compelling interest in protecting the mother's health at the end of the first trimester of pregnancy.<sup>81</sup> At this point, the state could establish reasonable regulation to protect the mother's health.<sup>82</sup> Prior to this point, the decision to terminate a pregnancy belonged to the woman's physician, free from state interference.<sup>83</sup>

The state also acquired a legitimate interest in the potential life of the child.<sup>84</sup> The Court found that the state's interest in the child became compelling at the point of viability,<sup>85</sup> when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."<sup>86</sup> The Court held that the state could proscribe abortion, except where it is necessary to protect the life or health of the mother,<sup>87</sup> once the child became viable.

In summary, *Roe* permits states to abolish the common law born alive rule where the medical basis for it has been undermined by technology: at the point of viability. It is after this point that the state is permitted to provide criminal penalties for intentional feticide. The Court did not limit the type of legislation which may cover viable feticide<sup>88</sup> nor the severity of penalties that could be imposed for it. Therefore, the states are free to make these determinations on their own. It is within the limits of *Roe* for state legislatures to provide full protection to a viable fetus, which includes treating viable feticide as murder. Yet without legislative action, the viable fetus will remain virtually unprotected against criminal attack.

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<sup>77</sup>*Id.* at 156-57.

<sup>78</sup>*Id.* at 158.

<sup>79</sup>*Id.* at 159.

<sup>80</sup>*Id.* at 162-63.

<sup>81</sup>*Id.* at 163.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>*Id.*

<sup>86</sup>*Id.* at 160 (footnote omitted).

<sup>87</sup>*Id.* at 163-64.

<sup>88</sup>The Court referred, nonetheless, to "tailored legislation." *Id.* at 165.

*B. The Subjective and Changing Meaning of Viability*

*Roe* permits the states to provide criminal penalties for intentional feticide after the point of viability. The Court noted in *Roe* that the medical profession usually set viability at approximately twenty-eight weeks.<sup>89</sup> Since *Roe*, the Court has altered the definition of viability and further refined the limits of permissible state intervention.

In *Planned Parenthood v. Danforth*,<sup>90</sup> the plaintiffs asserted that the Missouri abortion statute<sup>91</sup> was unconstitutional because it failed to incorporate *Roe*'s trimester approach and if denied viability only as the stage of fetal development when the life of the child could be sustained indefinitely,<sup>92</sup> with or without artificial aid. The Court, recognizing viability as a flexible and subjective term, held that it was not the proper legislative or judicial function to define the term "viability" according to a point in the gestational period.<sup>93</sup> Viability should be determined on a case-by-case basis by the attending physician.<sup>94</sup>

Three years later, the Court changed the definition of viability. In *Colautti v. Franklin*,<sup>95</sup> the Court struck down the Pennsylvania abortion statute<sup>96</sup> as void for vagueness.<sup>97</sup> The statute required physicians to use a standard of care defined by statute to preserve the life of a fetus being aborted when the fetus was or may have been viable.<sup>98</sup> The Court held that the statute was unconstitutional because it failed to distinguish clearly between "viability" and "may be viable."<sup>99</sup> According to the Court, viability is reached when, in the judgment of the attending physician, there is a *reasonable likelihood* that the fetus can achieve sustained survival outside the mother's womb, with or without artificial aid.<sup>100</sup> *Roe* required potential survival;<sup>101</sup> *Colautti* required the reasonable likelihood of it.

Developments in medical technology since *Roe* have reduced the time needed for a fetus to reach viability. As these developments continue, viability is likely to occur even earlier in the gestation period.<sup>102</sup> The

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<sup>89</sup>*Id.* at 160.

<sup>90</sup>428 U.S. 52 (1976).

<sup>91</sup>MO. REV. STAT. §§ 559.100, 542.380, 563.300 (1969).

<sup>92</sup>The Court never addressed the constitutionality of defining viability so as to require that the life of the child could be sustained indefinitely.

<sup>93</sup>428 U.S. at 64.

<sup>94</sup>*Id.*

<sup>95</sup>439 U.S. 379 (1979).

<sup>96</sup>PA. STAT. ANN. tit. 35 § 6605(a) (Purdon 1977).

<sup>97</sup>439 U.S. at 396.

<sup>98</sup>PA. STAT. ANN. tit. 35 § 6605(a) (Purdon 1977).

<sup>99</sup>439 U.S. at 392-93.

<sup>100</sup>*Id.* at 388.

<sup>101</sup>410 U.S. at 163.

<sup>102</sup>For a criticism of the viability approach for these reasons, see Note, *Fetal Viability and Individual Autonomy: Resolving Medical and Legal Standards for Abortion*, 27 U.C.L.A. L. REV. 1340 (1980).

Supreme Court specifically anticipated this in *Danforth* when it forbade states to define viability in terms of a point in gestation.<sup>103</sup>

*C. Fetal Protection Since Roe:  
Inconsistency Between Tort and Criminal Law*

1. *The Viable Fetus as a Person in Wrongful Death Actions.*—Since *Roe*, the early trend to allow recovery for the death of a stillborn viable fetus<sup>104</sup> has continued; recovery is now allowed in a majority of jurisdictions.<sup>105</sup> Of the twenty-eight states which allow recovery, sixteen states do so under statutes which describe the decedent as a "person."<sup>106</sup> Recovery has been justified on the bases of differing legislative intent, logic

<sup>103</sup>428 U.S. at 64.

<sup>104</sup>See *supra* text accompanying notes 53-57.

<sup>105</sup>*Simmons v. Howard Univ.*, 323 F. Supp. 529 (D.D.C. 1971); *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (Conn. Super. Ct. 1966); *Worgan v. Greggo & Ferrara, Inc.*, 128 A.2d 557 (Del. Super. Ct. 1956); *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Volk v. Baldazo*, 103 Idaho 570, 651 P.2d 11 (1982); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1971); *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Rice v. Rizk*, 453 S.W.2d 732 (Ky. 1970); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 331 N.E.2d 916 (1975); *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); *Pehrson v. Kistner*, 301 Minn. 229, 222 N.W.2d 334 (1974); *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *Salazar v. St. Vincent Hospital*, 95 N.M. 150, 619 P.2d 826 (N.M. Ct. App. 1980); *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1956); *Evans v. Olson*, 550 P.2d 924 (Okla. 1976); *Libbee v. Permanete Clinic*, 268 Or. 258, 518 P.2d 636 (1974); *Presley v. Newport Hosp.* 117 R.I. 177, 365 A.2d 748 (1976); *Fowler v. Woodward*, 224 S.C. 608, 138 S.E.2d 42 (1964); *Nelson v. Peterson*, 524 P.2d 1075 (Utah 1975); *Vaillancourt v. Medical Center Hosp. of Vermont, Inc.*, 139 Vt. 138, 425 A.2d 92 (1980); *Moen v. Hanson*, 85 Wash. 2d 597, 537 P.2d 266 (1975); *Baldwin v. Butcher*, 155 W. Va. 431, 184 S.E.2d 428 (1971); *Kwaterski v. State Farm Mut. Auto. Ins. Co.* 34 Wis. 2d 14, 148 N.W.2d 107 (1967); TENN. CODE ANN. § 20-5-106(a)(b) (1980). Currently, eleven jurisdictions deny recovery. *Kilmer v. Hicks*, 22 Ariz. App. 552, 529 P.2d 706 (1974); *Justus v. Atchison*, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); *Duncan v. Flynn*, 358 So.2d (Fla. 1978); *Weitl v. Moes*, 311 N.W.2d 259 (Iowa 1981); *Wascom v. American Indem. Corp.*, 348 So. 2d 128 (La. Ct. App. 1977); *Olejniczak v. Whitten* 605 S.W.2d 142 (Mo. Ct. App. 1980); *Egbert v. Wenzl*, 199 Neb. 573, 260 N.W.2d 480 (1977); *Endresz v. Friedberg*, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.W.S.2d 65 (1969); *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E.2d 382 (1975); *Scott v. Kopp*, 494 Pa. 487, 431 A.2d 959 (1981); *Lawrence v. Craven Tire Co.*, 210 Va. 138, 169 S.E.2d 440 (1969). The remaining jurisdictions have not considered the issue.

<sup>106</sup>DEL. CODE ANN. tit. 10, § 3704(a) (1974); D.C. CODE ANN. § 16-1-2701 (1981); ILL. ANN. STAT. ch. 70, § 1 (Smith-Hurd 1959); KY. REV. STAT. § 411.130 (Supp. 1982); MASS. GEN. LAWS ANN. ch. 229, § 2 (West Supp. 1983-84); MICH. COMP. LAWS ANN. § 600.2922 (Supp. 1983-84); MISS. CODE ANN. § 11-7-13 (1972 & Supp. 1983); NEV. REV. STAT. § 40.085(2) (1979); N.M. STAT. ANN. § 41-2-1 (1982); OHIO REV. CODE ANN. § 2125.01 (Page 1976 & Supp. 1983); R.I. GEN. LAWS § 10-7-1 (1969); S.C. CODE ANN. § 15-51-10 (Law. Co-op. 1976); VT. STAT. ANN. tit. 14, § 1491 (1974); WIS. STAT. § 895.04 (1982).

and justice, and recognition of modern medical advancements. The first justification is logically invalid. The latter two are logically valid but apply equally to criminal law.

Recovery for the wrongful death of a stillborn viable fetus has been allowed on the basis of legislative intent.<sup>107</sup> Some courts have held that the legislature intended to include the stillborn viable fetus as a potential decedent.<sup>108</sup> While this may be true of statutes which refer to the decedent as a "minor child,"<sup>109</sup> it is doubtful in the case of statutes that describe the decedent as a person. First, most of the wrongful death statutes were enacted soon after most states codified the common law, including its position on murder. It is doubtful that a state legislature would have intended to include the viable fetus as a "person" under the wrongful death statute but to exclude it from the same term under the murder statute. Second, when these statutes were enacted, knowledge of prenatal development was limited.<sup>110</sup> Legislatures could not have intended to include or exclude the stillborn viable fetus under the wrongful death statute.<sup>111</sup> Therefore, legislative intent cannot provide a logical justification for allowing the viable fetus to be treated as a person in tort but not in criminal law.

A second justification offered for allowing recovery for the wrongful death of a stillborn viable fetus is based on notions of logic and justice.<sup>112</sup> Recovery has been allowed on the rationale that it is illogical to deny recovery simply because a child did not survive long enough to be born, but to allow recovery for a child who is born alive but dies shortly thereafter, especially if the two are at the same period of gestation when the negligent act occurs.<sup>113</sup> It has also been argued that it is unjust to allow a tortfeasor who inflicts injury serious enough to cause *in utero* death to escape liability, while imposing liability on a tortfeasor who delivers a less serious injury.<sup>114</sup> A child who survives tortious prenatal

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<sup>107</sup>Kader, *supra* note 49, at 646.

<sup>108</sup> See, e.g., *Eich v. Town of Gulf Shores*, 293 Ala. 95, 99, 300 So. 2d 354, 356 (1976).

<sup>109</sup>Seven states that have allowed recovery have statutes that refer to the decedent as a child. ALA. CODE § 6-5-391 (1975); GA. CODE ANN. § 51-4-4 (1982); IDAHO CODE § 5-310 (1979); IND. CODE § 34-1-1-8 (1982); OR. REV. STAT. § 30.010 (1981); UTAH CODE ANN. § 78-11-6 (1953); WASH. REV. CODE § 4.24.010 (1962).

<sup>110</sup>Kader, *supra* note 49, at 648.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.* at 646.

<sup>113</sup>*Id.* at 646, n. 32 (citing *Eich v. Town of Gulf Shores*, 293 Ala. 95, 99, 300 So. 2d 354, 357 (1974); *Stidam v. Ashmore*, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959); *Libbee v. Permanete Clinic*, 268 Or. 258, 518 P.2d 636, 639 (1974); *Baldwin v. Butcher*, 155 W. Va. 431, 438-39, 184 S.E.2d 428, 432 (1971)).

<sup>114</sup>Kader, *supra* note 49, at 647 (citing *Eich v. Town of Gulf Shores*, 293 Ala. 95, 97, 300 So. 2d 354, 355 (1974); *Mone v. Greyhound Lines, Inc.*, 368 Mass. 354, 360-61, 331 N.E.2d 916, 920 (1975); *White v. Yup*, 85 Nev. 527, 536, 458 P.2d 617, 622 (1969); *Stidam*

injuries is permitted to recover for them in all jurisdictions. Consequently, not allowing recovery for tortious *in utero* death results in allowing the more harmful tortfeasor to escape liability. These two arguments can be applied with equal force to the viable fetus in criminal law. It is illogical that two fetuses capable of independent existence are treated so differently simply because one survives the attack until shortly after birth but the other dies shortly before birth. Furthermore, it is unjust for the attacker who is brutal enough successfully to kill a fetus *in utero* to face a substantially lesser penalty than the less brutal attacker who faces life imprisonment or death.<sup>115</sup>

The final reason given for allowing recovery for the death of a stillborn viable fetus is based on the realization that the common law is not always applicable to modern society. Some courts that have accepted the reasoning that limited knowledge of prenatal life precluded any legislative intent to include the stillborn viable fetus under the wrongful death statute have allowed recovery on the ground that the common law is not static and therefore any prior meaning of the term "person" should not determine the issue.<sup>117</sup> These courts note the advancements that modern medicine has made in the area of prenatal life. The notion that the fetus is part of the mother, which supported earlier decisions denying recovery,<sup>118</sup> has been rejected in many later cases.<sup>119</sup> Furthermore, courts have either accepted modern medicine's ability to determine causation<sup>120</sup> or have asserted that the difficulty of such proof should not necessitate dismissal of the cause at the pleading stage.<sup>121</sup> In the years since *Roe*, a majority of jurisdictions have recognized the obsolescence of the born alive rule and have treated the viable fetus as a person for the purposes of tort law.

2. *The Born Alive Rule Still Applied in Criminal Law.*—The *Roe* prohibition against criminally punishing intentional feticide applies to nonviable fetus only. After viability, the states are free to punish inten-

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v. Ashmore, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (1959); Presley v. Newport Hosp., 117 R.I. 177, 184, 365 A.2d 748, 752 (1976); Baldwin v. Butcher, 155 W. Va. 431, 443-44, 184 S.E.2d 428, 435 (1971); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 20, 148 N.W.2d 107, 110 (1967)).

<sup>115</sup>See *infra* notes 141-42 and accompanying text.

<sup>116</sup>Kader, *supra* note 49, at 648 (citing Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 22, 148 N.W.2d 107, 111 (1967)).

<sup>117</sup>Kader, *supra* note 49, at 648.

<sup>118</sup>See *supra* note 52 and accompanying text.

<sup>119</sup>According to one commentator, the last decision to deny recovery on the ground that the fetus was part of the mother was rendered more than 30 years ago. Kader, *supra* note 49, at 647.

<sup>120</sup>Kader, *supra* note 49, at 649 n.50 (citing Christafogeorgis v. Brandenburg, 55 Ill. 2d 368, 371-72, 304 N.E.2d 85, 90-91 (1973); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 360, 331 N.E.2d 916, 919 (1975)).

<sup>121</sup>Kader, *supra* note 49, at 649 n.51.

tional feticide as murder unless an abortion is necessary to save the mother's life. Post-*Roe* decisions, however, have applied the born alive rule unless the homicide statute specifically included the viable fetus.<sup>122</sup> Despite recognition that a viable fetus is capable of independent existence, courts continue to hold that, at common law, the terms used to describe the victim applied only to those born alive and, absent statutory definition to the contrary,<sup>123</sup> the common law definition applies.<sup>124</sup> Terms which have been held to require application of the born alive rule in post-*Roe* decisions are "person,"<sup>125</sup> "human being,"<sup>126</sup> and "individual."<sup>127</sup> Furthermore, a statute which neither described the victim nor classified the crime by a description of the victim<sup>128</sup> was recently held to require application of the born alive rule.<sup>129</sup>

It is highly likely that courts will continue to apply the born alive rule in cases brought under homicide statutes that fail to describe the

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<sup>122</sup>*State v. Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980) ( *in utero* killing of eight and one-half-month-old fetus not murder); *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983) (intentional killing of seven-month-old fetus not murder); *State v. Brown*, 378 So. 2d 916 (La. 1979); *State v. Gyles*, 313 So. 2d 799 (La. 1975) (prenatal death of eight-month-old fetus resulting from defendant's act of beating pregnant woman with a stick not murder); *Commonwealth v. Edelin*, 371 Mass. 497, 359 N.E.2d 4 (1976) (physician's failure to provide care for twenty-two to twenty-four-week-old fetus not manslaughter unless fetus was born alive); *People v. Guthrie*, 97 Mich. App. 226, 293 N.W.2d 775 (1980) ( *in utero* death of nine-month-old fetus resulting from automobile accident not negligent homicide), *appeal denied*, 417 Mich. 1006, 334 N.W.2d 616 (1983); *State v. Doyle*, 205 Neb. 345, 287 N.W.2d 59 (1980) (in prosecution for manslaughter of an infant, the state must prove that the infant had been born alive and achieved independent and separate existence); *State ex rel. A.W.S.*, 182 N.J. Super. 278, 440 A.2d 1144 (1981) (viable fetus not a potential victim under vehicular homicide statute); *State v. Willis*, 98 N.M. 771, 652 P.2d 1222 (1982) (viable fetus not a human being under the vehicular homicide statute); *State v. Amaro*, - R.I. \_\_\_\_\_, 448 A.2d 1257 (1982) (nine-month-old fetus not a person within the meaning of the vehicular homicide statute); *Lane v. Commonwealth*, 219 Va. 509, 248 S.E.2d 781 (1978) (fact that infant breathed a few times after being born alive was not sufficient to show it had acquired independent existence and therefore was not a possible victim of murder).

<sup>123</sup>Several states define these terms within their statutes, but do so according to the born alive rule. ALA. CODE § 13A-6-1(2) (1982); COLO. REV. STAT. § 18-3-101(2) (1973); HAWAII REV. STAT. § 707-700(1) (1976); MONT. CODE ANN. § 45-2-101(27) (1983); N.H. REV. STAT. ANN. § 630:1 (1974); N.Y. PENAL LAW § 125.05 (McKinney 1975); OR. REV. STAT. § 163.005(3) (1983); TEX. PENAL CODE ANN. § 1.07(a)(17) (Vernon 1974).

<sup>124</sup>*E.g.*, *People v. Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980).

<sup>125</sup>*Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983); *Commonwealth v. Edelin*, 371 Mass. 497, 359 N.E.2d 4 (1976); *State v. Doyle*, 205 Neb. 234, 287 N.W.2d 59 (1980); *Lane v. Commonwealth*, 219 Va. 509, 248 S.E.2d 781 (1978).

<sup>126</sup>*State v. Brown*, 378 So. 2d 916 (La. 1979); *State v. Gyles*, 313 So. 2d 799 (La. 1975); *State ex rel. A.W.S.*, 182 N.J. Super. 278, 440 A.2d 1144 (1981); *State v. Willis*, 98 N.M. 771, 652 P.2d 1222 (1982); *State v. Amaro*, \_\_\_\_\_ R.I. \_\_\_\_\_, 448 A.2d 1257 (1982).

<sup>127</sup>*People v. Greer*, 79 Ill. 2d 103, 402 N.E.2d 203 (1980).

<sup>128</sup>MICH. COMP. LAWS ANN. § 750.316 (West 1968 & Supp. 1983).

<sup>129</sup>*People v. Guthrie*, 97 Mich. App. 226, 293 N.W.2d 775 (1980).

victim or that describe the victim in common law terms. Unfortunately, the vast majority of jurisdictions employ common law terms to describe the victim of homicide. Twenty-two states describe the victim or classify the crime of murder as an offense against a "person."<sup>130</sup> Eighteen states use the term "human being"<sup>131</sup> and two states describe the murder victim as an "individual."<sup>132</sup> Of the remaining majority jurisdictions, four provide no description,<sup>133</sup> and one describes the victim as a "reasonable creature in being."<sup>134</sup> Only three states have attempted specifically to include the viable fetus under their murder statutes.<sup>135</sup>

In most states, conduct such as the defendant's in *Hollis* only may be punished as unlawful abortion should the born alive rule be applied to their murder statutes.<sup>137</sup> In a few jurisdictions, it is possible that the

<sup>130</sup>ALA. CODE § 13A-6-1(1) (1982); ALASKA STAT. § 11.41.100 (1983); ARIZ. REV. STAT. ANN. § 13-1105 (1978); ARK. STAT. ANN. § 41-1502(1)(b) (1977); COLO. REV. STAT. § 18-3-101(1) (1973); CONN. GEN. STAT. ANN. § 53a-54(a) (West 1958 & Supp. 1984); DEL. CODE ANN. tit. 11, § 636(d)(1) (1974 & Supp. 1982); HAWAII REV. STAT. § 707-701(1) (1976); IOWA CODE ANN. § 707.2 (West 1979); KY. REV. STAT. § 507.020 (1975 & Supp. 1982); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970); MINN. STAT. ANN. § 609.185 (West 1964 & Supp. 1984); MISS. CODE ANN. § 11-7-13 (1972 & Supp. 1983); NEB. REV. STAT. § 28-303 (1943); N.H. REV. STAT. ANN. § 630:1-a (1974); N.Y. PENAL LAW § 125.27 (McKinney 1975); OHIO REV. CODE ANN. § 2903.02(A) (Page 1982); S.C. CODE ANN. § 16-3-10 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 22-16-4 (1979 & Supp. 1983); VA. CODE § 18-2-32 (1950 & Supp. 1982); WASH. REV. CODE ANN. § 9A.32.030(1) (1977); W. VA. CODE § 61-2-1 (1977).

<sup>131</sup>FLA. STAT. ANN. § 782.04(1)(a) (West 1976 and Supp. 1984); GA. CODE § 16-5-1(a) (1982); IDAHO CODE § 18-4001 (1979); IND. CODE § 35-42-1-1 (1982); KAN. STAT. ANN. § 21-3401 (1981); ME. REV. STAT. ANN. tit. 17-A, § 201(1)(A) (1984); MO. ANN. STAT. § 565.003 (Vernon 1979); MONT. CODE ANN. § 45-5-101(1) (1981); NEV. REV. STAT. § 200.010 (1983); N.J. STAT. ANN. § 2C:11-2(a) (West 1982); N.M. STAT. ANN. § 30-2-1(A) (1984); N.D. CENT. CODE § 12.1-16-01 (1976 & Supp. 1983); OKLA. STAT. ANN. tit. 21, § 701.7 (West 1983); OR. REV. STAT. § 163.005(1) (1983); 18 PA. CONS. STAT. ANN. § 2501(a) (Purdon 1983); R.I. GEN. LAWS § 11-23-1 (1981); WIS. STAT. ANN. § 940.01(1) (West 1982); WYO. STAT. § 6-2-101(a) (1983).

<sup>132</sup>ILL. ANN. STAT. ch. 38, § 9-1(a) (Smith-Hurd 1979 & Supp. 1984); TEX. PENAL CODE ANN. § 19.02(a) (Vernon 1974).

<sup>133</sup>MD. ANN. CODE art. 27, § 407 (1982); MICH. COMP. LAWS ANN. § 750.316 (1968 & Supp. 1984); N.C. GEN. STAT. § 14-17 (1981); VT. STAT. ANN. tit. 13, § 2301 (1974 & Supp. 1984).

<sup>134</sup>TENN. CODE ANN. § 39-2-201 (1982).

<sup>135</sup>CAL. PENAL CODE § 187 (West Supp. 1984); LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1984); UTAH CODE ANN. § 76-5-201(1) (Supp. 1983).

<sup>136</sup>652 S.W.2d 61 (Ky. 1983). See *supra* text accompanying notes 1-5.

<sup>137</sup>ALA. CODE § 13A-13-7 (1982); ARK. STAT. ANN. § 41-2551 (1977); COLO. REV. STAT. § 18-6-102(1) (1978); CONN. GEN. STAT. ANN. §§ 53-29, 53-31 (West 1958); DEL. CODE ANN. tit. 11, § 651 (1974); D.C. CODE ANN. § 16-2701 (1981); IDAHO CODE § 18-605 (1979); ILL. ANN. STAT. ch. 98, 81-26 § 6(-1) (Smith-Hurd Supp. 1980); IND. CODE § 35-42-1-6 (1982) (called "feticide"); IOWA CODE ANN. § 707.7 (West 1979) (called "feticide"); KAN. STAT. ANN. § 21-3407 (1971); KY. REV. STAT. § 311.750 (1983); ME. REV. STAT. ANN. tit. 22, § 1598(3) (1964); MD. HEALTH CODE ANN. § 20.210 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 112, § 12N (West 1983); MICH. COMP. LAWS ANN. § 750.14 (1968); MINN. STAT.

conduct would be punished under a special manslaughter statute.<sup>138</sup> Most of these statutes, however, require that the death of the fetus be the result of injuries sustained by the mother that would be considered murder if the mother had died.<sup>139</sup> This type of statute has been interpreted to require that the defendant possess the intention to kill the mother;<sup>140</sup> an attacker who intends to kill only the fetus is not included. While these unlawful abortion and manslaughter statutes impose criminal penalties for conduct such as that in *Hollis*, they do not provide the full protection allowed by *Roe*. If conduct is considered murder, most jurisdictions permit a sentence of life imprisonment.<sup>141</sup> The penalties under the unlawful

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ANN. § 145.412 (West Supp. 1984); MONT. CODE ANN. § 50-20-109 (1983); NEB. REV. STAT. § 28-300 (1943); N.H. REV. STAT. ANN. § 585:13 (1974); N.M. STAT. ANN. § 30-5-3 (1984); N.Y. Penal Law § 125.45 (McKinney 1975); N.C. GEN. STAT. § 14-44 (1981); N.D. CENT. CODE § 14-02.1.04(5) (1981); OHIO REV. CODE ANN. § 2912.12(A) (Page 1982); 18 PA. CONS. STAT. ANN. § 3210(a) (Purdon 1983); S.C. CODE ANN. § 44-41-80(a) (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 22-17-5 (1979); TENN. CODE ANN. § 39-4-201 (1982); TEX. STAT. ANN. art. 4512.5 (Vernon 1976); VT. STAT. ANN. tit. 13, § 101 (1974); VA. CODE § 18:2-71 (1982); W. VA. CODE § 61-2-8 (1977); WIS. STAT. ANN. § 940.04 (West 1982); WYO. STAT. § 35-6-110 (1977).

<sup>138</sup>1983 Ariz. Legis. Serv. 268 (West); FLA. STAT. ANN. § 782.09 (West 1976); GA. CODE ANN. § 16-5-80(a) (Supp. 1983) (called "feticide"); MISS. CODE ANN. § 97-3-37 (1972); MO. STAT. ANN. § 565.026 (Vernon 1979); NEV. REV. STAT. § 200.210 (1979); OKLA. STAT. ANN. tit. 21, § 713 (West 1983); R.I. GEN. LAWS § 11-23-5 (1981); WASH. REV. CODE § 9A.32.060(1)(b) (1977).

<sup>139</sup>1983 Ariz. Legis. Serv. 268 (West); FLA. STAT. ANN. § 782.09 (West 1976); GA. CODE ANN. § 16-5-80(a) (Supp. 1983); MISS. CODE ANN. § 97-3-37 (1972); MO. STAT. ANN. § 565.026 (Vernon 1979); R.I. GEN. LAWS § 11-23-5 (1981).

<sup>140</sup>*E.g.*, *State v. Harness*, \_\_\_\_Mo.\_\_\_\_, 280 S.W.2d 11, 14 (1955) construing Mo. REV. STAT. § 559.090 (1949)).

<sup>141</sup>ALA. CODE § 13A-5-6(1) (1982) (or not more than 99 years); ARIZ. REV. STAT. ANN. § 13-703 (1956 & Supp. 1983) (or death); CAL. PENAL CODE § 190 (West 1970 & Supp. 1984) (or death); COLO. REV. STAT. § 18-1-105 (1978 & Supp. 1983) (or death); CONN. GEN. STAT. ANN. § 53a-35(a)(2) (West Supp. 1984); DEL. CODE ANN. tit. 11, § 4205(b)(1) (1979); D.C. CODE ANN. § 22-2404(a) (1981); FLA. STAT. ANN. § 775.082(1) (West 1976) (or death); GA. CODE ANN. § 16-5-1(d) (1982) (or death); HAWAII REV. STAT. § 707-606(b) (Supp. 1983); IDAHO CODE § 18-4004 (1979) (or death); IOWA CODE ANN. § 902.1 (West 1979 & Supp. 1984); KAN. STAT. ANN. § 21-4501(a) (Supp. 1984); KY. REV. STAT. § 507.020 (1975) (or death); LA. REV. STAT. ANN. § 14:30 (West Supp. 1984) (or death); ME. REV. STAT. ANN. tit. 17-A, § 1251 (1964 & Supp. 1983); MD. ANN. CODE art. 27, § 412 (1982) (or death); MASS. GEN. LAWS ANN. ch. 265, § 1 (West 1970) (or death); MICH. COMP. LAWS ANN. § 750.316 (Supp. 1984); MINN. STAT. ANN. § 609.185 (West 1964 & Supp. 1984); MISS. CODE ANN. § 97-3-21 (Supp. 1983); MO. ANN. STAT. § 565.008(2) (Vernon 1979); MONT. CODE ANN. § 45-5-102(2) (1983) (or death); NEB. REV. STAT. § 28-105(1) (1943) (or death); NEV. REV. STAT. § 200.030(4)(b) (1983); N.H. REV. STAT. ANN. § 630:1-(d) (1974); N.M. STAT. ANN. § 30-2-1 (1984) (or death); N.Y. PENAL LAW § 60.06 (McKinney 1975) (or death); N.C. GEN. STAT. § 14-17 (1981) (or death); N.D. CENT. CODE § 12.1-16-01 (Supp. 1983); OHIO REV. CODE ANN. § 2929.02(B) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.9(A) (West 1983) (or death); OR. REV. STAT. § 163.115(3) (1983); PA. STAT. ANN. tit. 18, § 1102(a) (Purdon 1983) (or death); R.I. GEN. LAWS § 11-23-2 (1981); S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 22-6-

abortion or manslaughter statutes, however, are substantially less severe.<sup>142</sup> The continued application of the born alive rule to intentional, nonconsensual viable feticide renders criminal law inconsistent with property and tort law. It not only denies the viable fetus treatment as a person, but also denies the viable fetus the full protection allowed under *Roe*. This inconsistency should be resolved by abolishing the born alive rule and including the viable fetus as a potential homicide victim.

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1(1) (1979 & Supp. 1983) (or death); TENN. CODE ANN. § 39-2-202(b) (1982) (or death); TEX. PENAL CODE ANN. § 12.32 (Vernon Supp. 1984) (or not more than 99 years); UTAH CODE ANN. § 76-3-203(1) (Supp. 1983); VT. STAT. ANN. tit. 13, § 2303(a) (Supp. 1984); VA. CODE § 18.2-10(b) (1982); WASH. REV. CODE § 9A.32.030(2) (1977); W. VA. CODE § 61-2-2 (1977); WIS. STAT. ANN. § 939.50(3)(a) (West 1982); WYO. STAT. § 6-2-101(b) (1983) (or death). *Contra* ALASKA STAT. § 12.55.125 (Supp. 1983) (not more than 99 years imprisonment); ARK. STAT. ANN. § 41-901(1)(a) (Supp. 1983) (not more than 40 years imprisonment); ILL. ANN. STAT. ch. 38, § 1005-8-1(1) (Smith-Hurd 1982) (not more than 40 years imprisonment); IND. CODE § 35-50-2-3 (1982) (40 years imprisonment); N.J. STAT. ANN. § 2C:11-3 (West 1982).

<sup>142</sup>ALA. CODE § 13A-13-7 (1982) (12 months imprisonment); ARIZ. REV. STAT. ANN. 13-701(B)(2) (1956) (5 years imprisonment); ARK. STAT. ANN. § 41-2553 (1977); (5 years imprisonment); CONN. GEN. STAT. ANN. §§ 53-29, 53a-35a(6) (West 1960 & Supp. 1984) (5 years imprisonment); DEL. CODE ANN. tit. 11, § 4205(b)(4) (1974) (10 years imprisonment); D.C. CODE ANN. § 22-201 (1981) (10 years imprisonment); FLA. STAT. ANN. § 775.082(3)(c) (West 1976) (15 years imprisonment); IDAHO CODE § 18-605 (1979) (5 years imprisonment); ILL. ANN. STAT. ch. 38, § 1005-8-1(5) (Smith-Hurd 1982) (7 years imprisonment); IND. CODE § 35-50-2-6 (1982) (5 years imprisonment); IOWA CODE ANN. § 902.9(1) (West 1979) (25 years imprisonment); KAN. STAT. ANN. § 21-4501(d) (Supp. 1984) (10 years imprisonment); KY. REV. STAT. § 311.990(14) (1983) (20 years imprisonment); ME. REV. STAT. ANN. tit. 17-A, § 1252(2)(c) (1964) (5 years imprisonment); MD. HEALTH CODE ANN. § 20-210(b) (Supp. 1983) (3 years imprisonment); MASS. GEN. LAWS ANN. ch. 112, § 12N (West 1983) (5 years imprisonment); MICH. COMP. LAWS ANN. § 750.503 (1968) (4 years imprisonment); MISS. CODE ANN. § 97-3-25 (1972) (20 years imprisonment); MISS. CODE ANN. § 97-3-25 (1972) (20 years imprisonment); MO. ANN. STAT. § 565.031 (Vernon 1979) (10 years imprisonment); MONT. CODE ANN. § 46-18-213 (1983) (10 years imprisonment); NEB. REV. STAT. § 28-330 (1943) (5 years imprisonment); NEV. REV. STAT. § 200.210 (1983) (10 years imprisonment); N.H. REV. STAT. ANN. § 585:13 (1974) (10 years imprisonment); N.M. STAT. ANN. § 31-18-15 (1981) (3 years imprisonment); N.Y. PENAL LAW § 70.00(2)(d) (1975) (7 years imprisonment); N.C. GEN. STAT. § 14-1.1(a)(8) (1981) (10 years imprisonment); N.D. CENT. CODE § 12.1-32-01(3) (Supp. 1983) (10 years imprisonment); OHIO REV. CODE ANN. § 2929.21(B)(1) (Page 1982) (6 months imprisonment); OKLA. STAT. ANN. tit. 21, § 715 (West 1983) (4 years imprisonment); PA. STAT. ANN. tit. 18, § 1103(3) (Purdon 1983) (7 years imprisonment); R.I. GEN. LAWS § 11-23-3 (1981) (20 years imprisonment); S.C. CODE ANN. § 44-41-80(a) (Law. Co-op. 1976) (5 years imprisonment); S.D. CODIFIED LAWS ANN. § 22-6-1(8) (Supp. 1983) (2 years imprisonment); TENN. CODE ANN. § 39-4-201(b)(1) (1982) (10 years imprisonment); VT. STAT. ANN. tit. 13, § 101 (1974) (10 years imprisonment); VA. CODE § 18-2-10(d) (1982) (10 years imprisonment); WASH. REV. CODE § 9A.20.020(1)(b) (Supp. 1984) (10 years imprisonment); W. VA. CODE § 61-2-8 (1977) (10 years imprisonment); WIS. STAT. ANN. § 940.04 (West 1982) (not more than 15 years imprisonment); WYO. STAT. § 35-6-110 (1977) (14 years imprisonment). *Contra* GA. CODE ANN. § 16-5-80(b) (Supp. 1983) (life imprisonment); MINN. STAT. ANN. § 609.10 (West Supp. 1984) (life imprisonment); TEX. HEALTH CODE ANN. art. 4512.5 (Vernon 1976) (life imprisonment). Three states appear not to punish the conduct. *See supra* note 6. Alternatively, three states have attempted to include the viable fetus under their murder statutes which equates the penalties. *See supra* note 135.

Including the viable fetus under wrongful death statutes has been, primarily, a judicial accomplishment.<sup>143</sup> Two obstacles, however, prevent courts from interpreting murder statutes to include the viable fetus: the rules of statutory construction and procedural due process.

Under rules of statutory construction, courts will give effect to legislative intent if it can be ascertained.<sup>144</sup> Where conduct can be covered under two conflicting acts, courts presume that the legislature intended the more specific legislation to prevail.<sup>145</sup> Because unlawful abortion statutes, and manslaughter statutes in a few states, specifically deal with intentional viable feticide, courts presume that the legislature intended for acts such as those in *Hollis* to be covered by the unlawful abortion law or manslaughter statute.<sup>146</sup>

Procedural due process also prevents judicial inclusion of the viable fetus under murder statutes. One aspect of procedural due process requires that an individual be given fair warning that certain conduct is prohibited by the statute.<sup>147</sup> Judicial expansion of the definition of the murder victim would fail to give the defendant the requisite fair warning because he would not be informed that his acts constituted murder until after the acts had been committed.<sup>148</sup> Including the viable fetus under the murder statute must be, therefore, the result of legislation.

## V. LEGISLATIVE REFORM: PROBLEMS AND A PROPOSED STATUTORY SCHEME

Several problems arise in enacting valid murder statutes that include the viable fetus. Inconsistent use of terms describing victims in a code may create difficulties for judicial enforcement. Several constitutional and policy problems may be encountered. The subjective meaning of viability creates due process concerns. Limiting the proscribed conduct to non-consensual viable feticide may subject the statute to equal protection attack, while including consensual feticide may also create difficulties. These problems can be solved, however, and a statutory scheme which includes the viable fetus as a potential murder victim is possible.

### A. *Drafting a Murder Statute to Include the Viable Fetus*

The three jurisdictions that have attempted to include the fetus<sup>149</sup> under their murder statutes have used two approaches: Louisiana and

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<sup>143</sup>See *supra* note 104.

<sup>144</sup>*Hollis v. Commonwealth*, 652 S.W.2d 61, 64 (Ky. 1983) (citing *City of Bowling Green v. Board of Educ.*, 443 S.W.2d 243, 247 (Ky. 1969)).

<sup>145</sup>652 S.W.2d at 64.

<sup>146</sup>*Id.*

<sup>147</sup>*Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

<sup>148</sup>*Hollis*, 652 S.W.2d at 64.

<sup>149</sup>CAL. PENAL CODE § 187 (West Supp. 1984); LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1984); UTAH CODE ANN. § 76-5-201(1) (Supp. 1983).

Utah have redefined the term "person"<sup>150</sup> or "human being"<sup>151</sup> to include the fetus; California has redefined murder to include the killing of a fetus.<sup>152</sup> The first approach has resulted in wording deficiencies<sup>153</sup> and the second has been criticized for placement deficiencies.<sup>154</sup>

In 1974, the Louisiana legislature attempted to include the fetus as a potential murder victim by redefining the term "person" in the definitional section of the penal code.<sup>155</sup> The murder statute, however, used the term "human being" to describe the victim.<sup>156</sup> In a case brought two years after the amendment, the Louisiana Supreme Court held that because the term "human being" had not been redefined to include the fetus, the born alive rule applied and the defendant therefore was not guilty of murder.<sup>157</sup>

Consistent terminology within a code section may also be relevant. While California has redefined murder to include the fetus,<sup>158</sup> the murder statute is placed under a broad section entitled "Of Crimes Against the Person." One commentator has suggested that this scheme may not be accepted by the judiciary,<sup>159</sup> and denies the fetus protection against all forms of criminal attack.<sup>160</sup>

The best solution to the wording and placement problems is to reword the section title to read "Of Crimes Against the Person or Viable Fetus." Murder should then be redefined as the unlawful killing of a person or viable fetus. This would show a clear intent to include the viable fetus as a potential murder victim and would permit legislatures to redefine all forms of criminal attack to include the viable fetus.

### *B. Constitutional and Policy Considerations in Affording the Viable Fetus Full Protection in Criminal Law*

Legislatures will have several issues to consider in drafting statutes that include the viable fetus as a potential victim of criminal attack. Some of these issues involve constitutional safeguards that legislatures must incorporate into the statute. Others involve policy considerations that will have important implications regarding the extent and conditions of protection for the viable fetus in criminal law.

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<sup>150</sup>LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1984).

<sup>151</sup>UTAH CODE ANN. § 76-5-201(1) (Supp. 1983).

<sup>152</sup>CAL. PENAL CODE § 187 (West Supp. 1984).

<sup>153</sup>State v. Gyles, 313 So. 2d 799 (La. 1975).

<sup>154</sup>See *infra* note 159.

<sup>155</sup>LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1984).

<sup>156</sup>LA. REV. STAT. ANN. § 14:30 (West 1976 & Supp. 1984).

<sup>157</sup>State v. Brown, 378 So. 2d 916 (La. 1979).

<sup>158</sup>CAL. PENAL CODE § 187 (West Supp. 1984).

<sup>159</sup>Note, *Feticide in California: A Proposed Statutory Scheme*, 12 U.C.D. L. REV. 723, 733 (1979). This proposition has not proven to be true. There has since been a successful prosecution under the statute for viable feticide. See *People v. Apodaca*, 76 Cal. App. 3d 479, 486, 142 Cal. Rptr. 830, 835 (1978).

<sup>160</sup>Note, *supra* note 159, at 725.

As a matter of due process, a criminal statute must give a person of ordinary intelligence fair notice that the conduct he contemplates is prohibited.<sup>161</sup> To provide such notice, a statute should include a definition of viability. The Supreme Court has defined fetal viability as the potential capacity and as the reasonable likelihood of potential capacity to live outside the mother's womb, albeit with artificial aid.<sup>162</sup> While the Court has not expressly distinguished the two definitions, they are inherently different. Viewed on a continuum, "potential capacity" implies that any possibility of survival is sufficient, whereas "reasonable likelihood" implies that the fetus' chances of survival must be fairly good. Legislatures should use the "reasonable likelihood" definition for two reasons. Because the reasonable capacity to survive will generally occur later in gestation than the mere potential capacity to survive, the chances of medical agreement as to whether viability had actually been achieved are greater. Furthermore, the reasonable likelihood standard reflects the latest view held by the Court. A murder statute that includes the viable fetus as a potential victim should define viable as having the reasonable likelihood of potential capacity to live outside the mother's womb, albeit with artificial aid.

The major due process issue arises from the Supreme Court's requirement that viability be determined on a case-by-case basis by the attending physician.<sup>163</sup> Because a physician is required to determine viability, it may be argued that a person of ordinary intelligence would not know at the time of the offense that he was attacking a viable fetus.<sup>164</sup> The Supreme Court, however, has held that it is not unfair to impose the risk of crossing the line on "one who deliberately goes perilously close to an area of proscribed conduct."<sup>165</sup> This risk has been imposed on the defendant in a viable feticide case brought under California's murder statute.<sup>166</sup> The California decision should be followed in other jurisdictions that include the viable fetus under their murder statutes.

In addition to due process concerns, including the viable fetus under a murder statute raises equal protection issues. While the focus of this Note has been nonconsensual viable feticide, consensual viable feticide must also be encompassed within the prohibited conduct in order to avoid equal protection attack. Under *Roe v. Wade*,<sup>167</sup> the state may punish viable feticide because its interest becomes compelling at the point of viability.<sup>168</sup> The state's interest is no less compelling when the pregnant woman consents to an abortion than when a fetus is destroyed by someone else without her consent. Treating the pregnant woman less severely without a legitimate justification violates equal protection.

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<sup>161</sup>*Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

<sup>162</sup>See *supra* notes 100-01 and accompanying text.

<sup>163</sup>*Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976).

<sup>164</sup>*People v. Apodaca*, 76 Cal. App. 3d 479, 142 Cal. Rptr. 830 (1978).

<sup>165</sup>*Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) (footnote omitted).

<sup>166</sup>*People v. Apodaca*, 76 Cal. App. 3d 479, 486, 142 Cal. Rptr. 830, 835 (1978).

<sup>167</sup>410 U.S. 113 (1973).

<sup>168</sup>*Id.* at 163.

Creating two classes of defendants, the mother and the third persons, and punishing one class substantially less severely than the other denies third parties equal protection, unless the state can show a compelling reason for the disparate treatment of the two groups. While states may face political opposition to treating consensual viable feticide as murder, two arguments may be advanced for such treatment. First, at present, viability occurs sufficiently late in pregnancy that the mother has a reasonable length of time in which to decide whether or not to bear a child. Her right to privacy is not being denied altogether but merely is limited to the time prior to when the state's interest becomes compelling. Second, in all but three jurisdictions,<sup>169</sup> post-viability feticide is punishable even if committed with the mother's consent unless a compelling reason for the abortion exists.

One justification for treating the mother differently from third parties exists when the mother's life or health is at stake. *Roe* permits the proscription of abortion at viability *except* where it is necessary to preserve the life or health of the mother.<sup>170</sup> Therefore, while a statute must include consensual viable feticide to meet equal protection requirements, it also must make an exception where the life or health of the mother requires it.

A second exception may be justified where the life or health of the child is in doubt. A case of this nature raises the life versus quality of life argument: whether no life is preferable to a life which must be endured with severe physical or mental defects. While this question often arises in wrongful life actions,<sup>171</sup> a legislature that desires to impose penalties for feticide must consider the issue. The Supreme Court has set no clear judicial guidelines regarding the resolution of this controversial policy issue. In *Roe*, the Court reasoned that the states could impose criminal penalties for abortion when the fetus became viable because at that point the child would be presumed to have the capability for a meaningful life.<sup>172</sup> While the Court never explained what a "meaningful life" is, the use of the term "meaningful" suggests a preference for quality of life. The Supreme Court, however, in *Colautti v. Franklin*<sup>173</sup> stated that viability is reached once a reasonable likelihood of sustained survival exists.<sup>174</sup> "Sustained survival" can exist under extremely miserable conditions. *Colautti*, therefore, suggests a preference for life, regardless of its quality.

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<sup>168</sup>*Id.* at 163.

<sup>169</sup>*See supra* note 6.

<sup>170</sup>410 U.S. at 163-64.

<sup>171</sup>For a discussion of wrongful life actions in general, see Note, *Wrongful Life: An Infant's Claim to Damages*, 30 BUFFALO L. REV. 587 (1981). For a discussion of issues raised when a child initiates a wrongful life action against the child's own parents, see Note, *Child v. Parent: A Viable New Tort of Wrongful Life?* 24 ARIZ. L. REV. 391 (1982).

<sup>172</sup>410 U.S. at 163.

<sup>173</sup>439 U.S. 379 (1979).

<sup>174</sup>*Id.* at 388.

The decision to exclude an abortion that is performed where the health of the child is in doubt is a policy decision to be made by the legislature. Legislatures should realize, however, that they are making this decision implicitly when they enact homicide statutes that include the viable fetus. It is not a policy consideration that can be ignored. A decision to exclude from a statute an abortion performed where the health of the child is in doubt is a choice for quality of life.<sup>175</sup> A decision not to make such an exclusion is a choice for life regardless of its quality.

The final consideration that legislatures will face is how far to extend viable fetal protection. While this Note has focused only on affording the viable fetus protection under a murder statute, the viable fetus is susceptible to all forms of criminal attack, including manslaughter, negligent homicide, vehicular homicide, assault, and battery. Providing full protection to the viable fetus means protecting it against all forms of attack.

### C. PROPOSED STATUTE

The following is a proposed statutory scheme for including the viable fetus under murder statutes. It is intended to illustrate how legislatures can include the viable fetus in a statutory scheme, not to suggest that the viable fetus should be protected only against intentional criminal attack that results in death *in utero*.

## CRIMES AGAINST THE PERSON AND VIABLE FETUS

### §1 Definitions and Limitations

- (a) Viable Fetus: A viable fetus is a fetus that, in the judgment of the attending physician on the particular facts of the case, has a reasonable likelihood of sustained survival outside the mother's womb, with or without artificial support.
- (b) Limitations
  - (1) Nothing in this Act shall be construed as prohibiting an abortion which, in the judgment of a licensed physician, is necessary to preserve the life or health of the mother.
  - (2) Nothing in this Act shall be construed as prohibiting an abortion where, in the judgment of a licensed physician, the life or health of the fetus is endangered.<sup>176</sup>

### §2 Murder is the unlawful killing of a person or viable fetus with (jurisdiction's appropriate *mens rea*).

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<sup>175</sup>It must be noted that the choice of whether or not to exclude an abortion when the child's health is endangered may establish an argument for the acceptance or rejection of wrongful life actions in the jurisdiction. If the legislature chooses life over quality of life, a tort defendant could argue that the choice should be applied to a wrongful life action as well.

<sup>176</sup>This limitation could be omitted in states whose legislatures determine that life is more valuable than no life.

## VI. CONCLUSION

Without legislation that includes the viable fetus as a potential victim of criminal attack, the viable fetus remains inadequately protected from attacks such as the one that recently occurred at an Indianapolis, Indiana high school. There, a fourteen-year-old pregnant student was stabbed by two female classmates who stated that they were going to kill the mother and her baby. The six-month-old fetus was later delivered stillborn as a result of the stabbing.<sup>177</sup> The attackers were charged<sup>178</sup> with feticide,<sup>179</sup> a crime that carries a maximum penalty of five years.<sup>180</sup> The Indiana murder statute<sup>181</sup> carries a maximum penalty of forty years' imprisonment,<sup>182</sup> but uses the term "human being" to describe the victim. The born alive rule would have been applied, rendering a murder conviction unobtainable.

The born alive rule was necessary during the early common law period in which it was established. Medical technology was too limited to provide proof that the death of a stillborn fetus was caused by the acts of an attacker and that the fetus was capable of independent existence. These medical impediments have been removed, as recognized by the term "viable" itself and by the change in tort law to allow recovery for the wrongful death of a stillborn viable fetus.

The criminal law should abolish the born alive rule at the point the fetus has reached viability. It is at this point that the state acquires a compelling interest in the fetus and criminal penalties for its destruction are constitutionally permissible. Abolishing the born alive rule in criminal law must be the result of legislative initiative because the rules of statutory construction and due process will restrain courts from so acting.

While the legislatures will face problems in drafting statutes that include viable fetus as a potential victim of criminal attack, these obstacles are surmountable. Careful consideration of the issues and careful draftsmanship of a statutory scheme can provide full protection to the viable fetus, yet remain within the limits imposed by *Roe v. Wade*.<sup>183</sup>

TRACY A. NELSON

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<sup>177</sup>Indianapolis Star, Oct. 16, 1984, § 1, at 1, col. 1. One of the attackers was 17 and the other was 14. The attack was apparently motivated by the victim's involvement with the older girl's boyfriend.

<sup>178</sup>*Id.*

<sup>179</sup>IND. CODE § 35-42-1-6 (1982).

<sup>180</sup>*Id.* § 35-50-2-6 (1982). An additional three years imprisonment is allowed where aggravating circumstances are present.

<sup>181</sup>*Id.* § 35-42-1-1 (1982).

<sup>182</sup>*Id.* § 35-50-2-3 (1982).

<sup>183</sup>410 U.S. 113 (1973).

# The Admissibility of Rape Trauma Syndrome Expert Testimony in Indiana

## I. INTRODUCTION

Rape is one of America's four major violent crimes.<sup>1</sup> It is one of the most under-reported crimes,<sup>2</sup> and one in which convictions are difficult to secure.<sup>3</sup> The low conviction rate in rape cases contributes to the large number of rapes which occur because assailants are free to repeat the offense. The small number of convictions also deters victims from reporting the crime because they feel nothing can be done.<sup>4</sup>

Particularly, lack of consent by the victim, a requisite element of rape, presents a troublesome and controversial issue in court.<sup>5</sup> Rape trauma syndrome, a common sequential pattern of behavioral and emotional reactions experienced by rape victims, is one tool to assist prosecutors in establishing lack of consent.<sup>6</sup> However, courts which have considered expert testimony on rape trauma syndrome are not in agreement regarding the testimony's admission into evidence.<sup>7</sup>

Indiana courts have yet to address the admissibility of rape trauma syndrome testimony. This Note examines the requirements for the admissibility of expert testimony in Indiana and provides an extended analysis of the status of rape trauma syndrome expert testimony within these evidentiary rules. This Note suggests that expert testimony on rape trauma syndrome can satisfy Indiana's admissibility requirements, and thus should be used by prosecutors as substantive proof of lack of consent in criminal proceedings for rape. Recognizing that rape trauma syndrome should not be a source of evidence in every rape prosecution, this Note submits that its use in appropriate cases will lead to a greater number of convictions and, in turn, will encourage more reporting of the crime of rape.

## II. BACKGROUND

Rape is defined by statute as knowingly or intentionally having sexual intercourse with a member of the opposite sex when "the other per-

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<sup>1</sup>U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS 5 (1982) [hereinafter cited as CRIME IN THE UNITED STATES].

<sup>2</sup>*Id.* at 14.

<sup>3</sup>See S. KATZ & M. MAZUR, UNDERSTANDING THE RAPE VICTIM 199 (1979).

<sup>4</sup>See Comment, *Scientific Evidence in Rape Prosecution*, 48 U. OF MO. K.C. L. REV. 216, 216 (1980) [hereinafter cited as Comment, *Scientific Evidence*].

<sup>5</sup>S. KATZ & M. MAZUR, *supra* note 3, at 12-14.

<sup>6</sup>See *infra* notes 29-63 and accompanying text.

<sup>7</sup>For cases admitting rape trauma syndrome expert testimony into evidence, see *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978). For cases which did not permit expert testimony on rape trauma syndrome, see *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc).

son is compelled by force or imminent threat of force.”<sup>8</sup> Forcible rape is one of the four major violent crimes in the United States, the others being murder, robbery, and aggravated assault.<sup>9</sup> Rape affects the lives of thousands of women each year. During 1982, there were an estimated 77,763 forcible rapes reported to law enforcement agencies in the United States.<sup>10</sup> In addition to the number of reported rapes, forcible rape is also recognized as one of the most under-reported crimes.<sup>11</sup> It is estimated that one and one-half to twenty times more rapes actually occur than are reported.<sup>12</sup> Factors which have been shown to affect victims’ decisions to contact law enforcement officials include the feeling that nothing could be done or victimization was not important enough, embarrassment over the incident, and fear of reprisal.<sup>13</sup> In addition to the underreporting of its occurrence, rape also has a low conviction rate.<sup>14</sup> Thus, “the courts deal with . . . few persons accused of rape—few because most rapes are unreported, because those rapes reported are often unsolved, and because those charged with the crime of rape are often found not guilty.”<sup>15</sup>

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<sup>8</sup>IND. CODE § 35-42-4-1(a)(1) (1982). Indiana’s rape statute also includes the case where the victim is “unaware that the sexual intercourse is occurring; or the other person is so mentally disabled or deficient that consent to sexual intercourse cannot be given.” *Id.* § 35-42-4-1(a)(2)-(3). However, Indiana’s rape statute does not apply to sexual intercourse between spouses unless a petition for dissolution of the marriage, a petition for legal separation, or a protective order is pending and the spouses are living apart. *Id.* § 35-42-4-1(b). The concept of “statutory rape,” formerly included in the rape statute, is now found in Indiana’s child molestation statute. *See* IND. CODE § 35-42-4-3 (1982). Statutory rape, as compared with forcible rape, is a strict liability offense which occurs when a female under 16 years of age is raped, whether the rape is committed forcibly or whether there is consent. *See Williams v. State*, 178 Ind. App. 554, 383 N.E.2d 416 (1978). For purposes of this Note, rape is defined as forcible rape of adult females.

<sup>9</sup>CRIME IN THE UNITED STATES, *supra* note 1, at 5.

<sup>10</sup>*Id.* at 14.

<sup>11</sup>*Id.*

<sup>12</sup>*See also* S. KATZ & M. MAZUR, *supra* note 3, at 16 (stating that 1.5 to 100 times more rapes are estimated to actually occur compared to those that are reported); O’Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution—Or How Many Times Must a Woman Be Raped?*, 18 SANTA CLARA L. REV. 119, 139 (1978) (estimates range from 1 to 20 reporting to 1 in 4.5); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 547 n.13 (1980) (it is estimated that the actual number of rapes ranges from 3.5 to 20 times the number of reported rapes).

<sup>13</sup>*See* U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 302-03 (1982); CRIME IN THE UNITED STATES, *supra* note 1, at 14; Comment, *Scientific Evidence*, *supra* note 4, at 216; *see also* S. KATZ & M. MAZUR, *supra* note 3, at 185-86.

<sup>14</sup>T. BENEKE, *MEN ON RAPE* 2 (1982) (an estimated two to three percent of all men who rape outside of marriage serve time in prison for this crime); S. KATZ & M. MAZUR, *supra* note 3, at 199 (cited study showed a 3 percent conviction rate); O’Neale, *supra* note 12, at 142 (the conviction rate for forcible rape is the lowest of any violent crime); Comment, *Scientific Evidence*, *supra* note 4, at 216 (rape is the most underreported and least-punished felony in the United States).

<sup>15</sup>E. FERSCH, *PSYCHOLOGY AND PSYCHIATRY IN COURTS AND CORRECTIONS* 270 (1980).

The law of rape requires that the victim not have consented to sexual intercourse.<sup>16</sup> Indiana's rape statute does not explicitly contain the element of lack of consent, but requires that the victim be "compelled by force or imminent threat of force" to engage in sexual intercourse.<sup>17</sup> Implicit in the term "compelled" is the concept of "against the victim's will," which was a requirement of Indiana's former rape statute.<sup>18</sup> Courts construing the prior statute found the absence of consent to be an essential element of the crime.<sup>19</sup> Thus, before a rape conviction may be obtained in Indiana, the prosecutor must prove the use of force or threat of force by the assailant as well as absence of consent on the part of the victim.<sup>20</sup>

To establish lack of consent and force, the prosecutor usually relies on the testimony of the complaining witness corroborated by independent evidence of the victim's condition following the attack.<sup>21</sup> Physical injury sustained by the victim is viewed as the best possible inferential proof of these elements.<sup>22</sup> Indiana courts readily admit testimony concerning the victim's physical condition subsequent to the alleged incident.<sup>23</sup> Particularly relevant are hymenal membrane lacerations and other signs of trauma in the vaginal area.<sup>24</sup>

However, not every victim of rape manifests physical signs of the

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<sup>16</sup>S. KATZ & M. MAZUR, *supra* note 3, at 15.

<sup>17</sup>IND. CODE § 35-42-4-1(a)(1) (1982).

<sup>18</sup>IND. CODE ANN. § 35-42-4-1 commentary (West 1978).

<sup>19</sup>*See* Burke v. State, 250 Ind. 568, 580, 238 N.E.2d 1, 8 (1968); Rahke v. State, 168 Ind. 615, 622, 81 N.E. 584, 587 (1907).

<sup>20</sup>*See* Lottie v. State, 273 Ind. 529, 534, 406 N.E.2d 632, 636 (1980) (element of crime of rape is that carnal knowledge of the woman must be against her will and consent). Technically, force and lack of consent are two separate elements of the crime of rape. The element of force focuses on the conduct of the assailant while the element of nonconsent concerns the behavior of the victim. Irrespective of this distinction, evidence that the victim suffered from rape trauma syndrome may be used to establish both of these elements. *See* Comment, *Scientific Evidence*, *supra* note 4, at 220-22. However, rape trauma syndrome is more closely related to the element of nonconsent of the victim. In the cases admitting expert testimony concerning rape trauma syndrome, this testimony was used to rebut the defense of consent. *See* State v. Marks, 231 Kan. 645, 647 P.2d 1292 (1982); State v. LeBrun, 37 Or. App. 411, 587 P.2d 1044 (1978).

<sup>21</sup>In Indiana, a rape conviction may be based on the uncorroborated testimony of the victim. Morgan v. State, 425 N.E.2d 625, 627 (Ind. 1981); Ives v. State, 418 N.E.2d 220, 223 (Ind. 1981). However, the use of corroborating evidence undoubtedly assists the prosecutor in obtaining convictions and raises the rape trial above the level of a verbal battle between the complainant and the defendant.

<sup>22</sup>*See* Tanford & Bocchino, *supra* note 12, at 584; Comment, *Scientific Evidence*, *supra* note 4, at 222.

<sup>23</sup>*See* Aron v. State, 271 Ind. 412, 415, 393 N.E.2d 157, 159 (1979); Alstott v. State, 205 Ind. 92, 95, 185 N.E. 896, 897 (1933); Messel v. State, 176 Ind. 214, 217-18, 95 N.E. 565, 566 (1911). Photographs of the victim's physical condition subsequent to the attack are also admissible. *See, e.g.,* Dillon v. State, 422 N.E.2d 1188, 1190 (Ind. 1981); Palmer v. State, 153 Ind. App. 648, 686-87, 288 N.E.2d 739, 761-62 (1972).

<sup>24</sup>*See* Page v. State, 410 N.E.2d 1304, 1307 (Ind. 1980), *appeal after remand*, 424 N.E.2d 1021 (Ind. 1981), *appeal after second remand*, 442 N.E.2d 977 (Ind. 1982); Bledsoe v. State, 410 N.E.2d 1310, 1317 (Ind. 1980).

attack.<sup>25</sup> Illustrative of this fact is the study of Drs. A. Nicholas Groth and Ann W. Burgess which shows that sixty-five percent of the examined assaults were "power rapes" where the offender threatens or intimidates his victim rather than physically abusing her.<sup>26</sup> Physiological evidence to support the victim's allegations may also be lost when the victim delays in making her complaint.<sup>27</sup> Regardless of the reason for the lack of physical evidence, without such evidence the prosecutor may have difficulty in persuading the jury that a rape has been committed.<sup>28</sup>

If the prosecutor has little or no physical evidence to establish lack of consent, expert psychological testimony about the victim's post-rape reaction may help bolster the case.<sup>29</sup> The expert, either a doctor or a rape crisis counselor, can testify that the victim suffered from an identifiable psychological syndrome which is characteristic of victims of rape.<sup>30</sup> The jury may infer from this testimony and other evidence that the victim did not consent and that a rape, in fact, occurred.<sup>31</sup>

The common sequential pattern of behavioral and emotional reactions experienced by victims of rape has been called rape trauma syndrome by Drs. Ann W. Burgess and Lynda L. Holmstrom, the most noted authorities in this area.<sup>32</sup> According to Burgess and Holmstrom, "[r]ape trauma syndrome is the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic and psychological reactions is an acute

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<sup>25</sup>Studies in this area show varying results. The Center for Women Policy Studies found that approximately 63% of adult rape victims suffered some physical injury. In contrast, Schiff's study showed only 38% to have suffered physical injuries, and Massey reported only 10.6% had external evidence of trauma. Burgess and Holmstrom found that over half of the women in their study had at least one visible bruise to the body as a result of the assault. S. KATZ & M. MAZUR, *supra* note 3, at 162-63.

<sup>26</sup>Groth & Burgess, *Rape: A Sexual Deviation*, 47 AM. J. ORTHOPSYCHIATRY 400, 404 (1977).

<sup>27</sup>See Comment, *Scientific Evidence*, *supra* note 4, at 220-21.

<sup>28</sup>As one rape victim remarked, a woman must be "bruised, bloody, and damned near dead" in order for the sexual assault not to be considered consensual. Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 347 (1973) [hereinafter cited as Note, *Forcible Rape Case*].

<sup>29</sup>See Comment, *Scientific Evidence*, *supra* note 4, at 221.

<sup>30</sup>See *infra* notes 32-63 and accompanying text.

<sup>31</sup>See *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978).

<sup>32</sup>See Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974) (this article is to be distinguished from that at note 53, *infra*); see also *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 38-43, 428 A.2d 126, 138-40 (1981) (Larsen, J., dissenting); S. KATZ & M. MAZUR, *supra* note 3, at 215-31; Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. PSYCHIATRY 408 (1976); Sutherland & Scherl, *Patterns of Response Among Victims of Rape*, 40 AM. J. ORTHOPSYCHIATRY 503 (1970); Comment, *Rape Victim-Rape Crisis Counselor Communications: A New Testimonial Privilege*, 86 DICK L. REV. 539, 543-44 (1982) [hereinafter cited as Comment, *Rape Victim*]; Comment, *Scientific Evidence*, *supra* note 4, at 221-22. See generally *State v. Marks*, 231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982) (providing a list of sources).

stress reaction to a life-threatening situation.”<sup>33</sup> The psychological phenomenon of rape trauma syndrome was identified by Burgess and Holmstrom in a study conducted in 1972 and 1973 of ninety-two adult women who were victims of forcible rape.<sup>34</sup> Burgess and Holmstrom found that although rape victims do not necessarily exhibit identical emotional responses, the victims in their study did experience a syndrome with specific symptomology.<sup>35</sup> Their conclusion has been supported by the studies of other researchers and medical personnel which reveal that most rape victims develop psychiatric symptoms and behavioral changes following a rape.<sup>36</sup> In addition, in 1979 the American Psychiatric Association accepted rape as a causal factor of the mental disorder of post-traumatic stress disorder.<sup>37</sup>

Rape trauma syndrome, as defined by Burgess and Holmstrom, consists of a two-phase reaction.<sup>38</sup> The general reaction stages are compatible with the coping behavior of victims of other stress and life-threatening situations.<sup>39</sup> However, the specific symptoms of the rape victim are unique to rape trauma syndrome.<sup>40</sup>

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<sup>33</sup>Burgess & Holmstrom, *supra* note 32, at 982.

<sup>34</sup>*Id.* at 981.

<sup>35</sup>*Id.* at 982-83; see S. KATZ & M. MAZUR, *supra* note 3, at 217; Comment, *Rape Victim*, *supra* note 32, at 543 (“Although not all victims exhibit identical emotional patterns, ‘virtually all [of them] experience some of the emotions described and, therefore, the rape trauma syndrome provides a useful means to discuss the general reactions of victims to a rape experience.’” (quoting NAT’L INSTITUTE OF LAW ENFORCEMENT AND CRIM. JUSTICE, LAW ENFORCEMENT ADMIN., U.S. DEP’T OF JUSTICE, FORCIBLE RAPE—FINAL PROJECT REPORT 21 (1978) (Washington, D.C., Gov’t Printing Office, 1978))).

<sup>36</sup>See Kilpatrick, Veronen, & Resick, *The Aftermath of Rape: Recent Empirical Findings*, 49 AM. J. ORTHOPSYCHIATRY 658 (1979); Notman & Nadelson, *supra* note 32; Sutherland & Scherl, *supra* note 32; see also S. KATZ & M. MAZUR, *supra* note 3, at 215-31.

<sup>37</sup>AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL FOR MENTAL DISORDERS 5, 236-39 (3d ed. 1980).

<sup>38</sup>Burgess & Holmstrom, *supra* note 32, at 985. Sutherland and Scherl reported a three-phase pattern of response to rape. In the initial phase, the victim displays signs of acute distress. The second phase is a pseudoadjustment period in which the victim denies the impact of the rape and returns to her usual activities. In the third phase, depression often occurs and the victim feels the need to talk about the experience. Sutherland & Scherl, *supra* note 32.

<sup>39</sup>Burgess & Holmstrom, *supra* note 32, at 985. Notman and Nadelson compared rape with other crisis situations that are unexpected and viewed as life-threatening. Allowing for differences in culture and personality style, these psychiatrists found that victims of rape display the same four reaction stages as victims of major stress. The four reaction stages are anticipatory or threat phase, impact phase, post-traumatic or “recoil” phase, and posttraumatic reconstitution phase. Notman & Nadelson, *supra* note 32, at 409; see Comment, *Scientific Evidence*, *supra* note 4, at 221.

<sup>40</sup>See Burgess & Holmstrom, *supra* note 32, at 981-85. Justice Larsen in *In re Pittsburgh Action Against Rape* agrees that post-rape symptoms are distinguishable from those that follow other violent crimes:

The depth and range of emotional and psychological disturbance is not felt by the victims of most other crimes. Trauma is the natural consequence of any

The first phase of rape trauma syndrome is the acute phase.<sup>41</sup> This phase is characterized by a significant disruption of the victim's lifestyle as a result of the rape.<sup>42</sup> Physical symptoms are especially prominent during this phase.<sup>43</sup> Some of the somatic reactions experienced by victims are soreness and bruising, skeletal muscle tension, gastrointestinal irritability, and genitourinary disturbance including vaginal discharge, itching, a burning sensation on urination and generalized pain.<sup>44</sup>

Moreover, during the acute phase, victims also react emotionally to the experience.<sup>45</sup> The initial emotional reaction may take the form of shock, dismay, and disbelief.<sup>46</sup> The victim may also experience a wide array of emotions including fear, anger, revenge, humiliation, embarrassment, and self-blame.<sup>47</sup> Of these emotions, the primary feeling described is fear<sup>48</sup>—"fear of offender retaliation, fear of being raped again, fear of being home alone, fear of men in general, fear of being out alone. . . ."<sup>49</sup>

Within phase one, Burgess and Holmstrom identified two emotional styles or types of response.<sup>50</sup> One-half of the women in their study displayed the expressed style in which the victim's emotions are exhibited by crying, sobbing, smiling, restlessness, and tenseness.<sup>51</sup> The other half of the studied group showed the controlled response, masking their feelings behind a calm and composed exterior.<sup>52</sup> This finding is notable because it refutes the stereotype that all rape victims are hysterical.<sup>53</sup>

The second phase begins when the victim starts to reorganize her lifestyle.<sup>54</sup> The commencement of this phase varies with the individual vic-

violent crime. However, many of the symptoms of rape trauma syndrome will not be experienced with any degree of regularity by victims of non-rape crimes.

494 Pa. 15, 42-43, 428 A.2d 126, 140 (1981) (emphasis omitted) (Larsen, J., dissenting).

<sup>41</sup>Burgess & Holmstrom, *supra* note 32, at 982.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.* at 982-83; see S. KATZ & M. MAZUR, *supra* note 3, at 220; Comment, *Scientific Evidence*, *supra* note 4, at 221.

<sup>45</sup>Burgess & Holmstrom, *supra* note 32, at 983.

<sup>46</sup>*Id.* at 982; see Notman & Nadelson, *supra* note 32, at 409; Sutherland & Scherl, *supra* note 32, at 504.

<sup>47</sup>Burgess & Holmstrom, *supra* note 32, at 983; see S. KATZ & M. MAZUR, *supra* note 3, at 216-23; Notman & Nadelson, *supra* note 32, at 410; Comment, *Scientific Evidence*, *supra* note 4, at 221.

<sup>48</sup>Burgess & Holmstrom, *supra* note 32, at 983; Donadio & White, *Seven Who Were Raped*, 22 NURSING OUTLOOK 245, 246 (1974); Notman & Nadelson, *supra* note 32, at 409.

<sup>49</sup>State v. Marks, 231 Kan. 645, 653, 647 P.2d 1292, 1299 (1982).

<sup>50</sup>Burgess & Holmstrom, *supra* note 32, at 982. Psychiatrists Notman and Nadelson found that rape victims, like fire and flood victims, may respond to the crisis either coolly and collectedly or react with confusion, paralyzing anxiety, an inability to move, or hysterical crying or screaming. Notman & Nadelson, *supra* note 32, at 409.

<sup>51</sup>Burgess & Holmstrom, *supra* note 32, at 982.

<sup>52</sup>*Id.*

<sup>53</sup>Holmstrom & Burgess, *Assessing Trauma in the Rape Victim*, 75 AM. J. NURSING 1288, 1290 (1975) (this article is to be distinguished from that at *supra* note 32).

<sup>54</sup>Burgess & Holmstrom, *supra* note 32, at 982.

tim, with most victims entering this phase about two to three weeks after the attack.<sup>55</sup> Nightmares and phobias are especially prevalent in the second phase.<sup>56</sup> The surveyed group experienced, in varying degrees, fear of crowds, people behind them, being indoors or outdoors (usually depending upon the place of the assault), and being alone.<sup>57</sup> An increase in motor activity is also likely in this phase. The surveyed victims often reacted by changing their telephone numbers and their residences during this period.<sup>58</sup> Finally, many victims experienced anxiety which disrupted their normal sexual activity.<sup>59</sup>

The duration of the second phase of rape trauma syndrome has not been definitively determined.<sup>60</sup> The followup conducted by Burgess and Holmstrom a few weeks or months after the rapes revealed that forty-nine percent of the surveyed victims claimed they were completely or almost completely recovered from the rape experience.<sup>61</sup> Other studies show that most rape victims seem to recover from the incident within a year.<sup>62</sup> However, despite general recovery, many clinical observers as well as victims report that forcible rape results in chronic psychological scars.<sup>63</sup>

The regularity with which victims experience the symptoms of rape trauma syndrome and the identifiable nature of the syndrome make it a useful tool in establishing the requisite element of lack of consent by the victim.<sup>64</sup> Prosecutors in a number of states have sought, with varying results, to admit expert testimony that the victim suffered from rape trauma syndrome.<sup>65</sup> Indiana courts have yet to address the issue of the admissibility of expert testimony on rape trauma syndrome.

### III. THE ADMISSIBILITY OF EXPERT TESTIMONY IN INDIANA

Generally, before any type of expert testimony is admitted by the trial court for the jury's consideration, certain evidentiary requirements must be met.<sup>66</sup> The first requirement is that the subject of the testimony must

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<sup>55</sup>*Id.*

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 984; see S. KATZ & M. MAZUR, *supra* note 3, at 218; Comment, *Scientific Evidence*, *supra* note 4, at 221.

<sup>58</sup>Burgess & Holmstrom, *supra* note 32, at 983.

<sup>59</sup>*Id.* at 984; see S. KATZ & M. MAZUR, *supra* note 3, at 223-24.

<sup>60</sup>See S. KATZ & M. MAZUR, *supra* note 3, at 227-29.

<sup>61</sup>*Id.* at 227 (of the surveyed group, 16% denied having any symptoms and 33% reported minimal discomfort).

<sup>62</sup>*Id.* at 229 (only those rape victims with prior psychiatric or emotional difficulties required additional psychiatric treatment).

<sup>63</sup>*Id.* at 227.

<sup>64</sup>Comment, *Scientific Evidence*, *supra* note 4, at 220-22.

<sup>65</sup>For cases finding rape trauma syndrome expert testimony admissible, see *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978). For cases which did not permit expert testimony on rape trauma syndrome, see *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc).

<sup>66</sup>See C. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 13, at

be beyond the ken of the average laymen or that the evidence assist the trier of fact.<sup>67</sup> Second, the expert witness must possess sufficient skill, knowledge, or experience in the field so that his opinion probably will aid the trier of fact.<sup>68</sup> The third requirement, referred to as the reliability requirement, is that "the state of the pertinent art or scientific knowledge [must] permit a reasonable opinion to be asserted . . . by an expert."<sup>69</sup> This evidentiary requirement is generally interpreted as requiring the expert testimony to have a recognized theoretical basis.<sup>70</sup> Fourth, the probative value of the expert testimony must not be substantially outweighed by the probative dangers which would result from admitting the testimony.<sup>71</sup>

The proponent of the testimony has the burden to establish that the witness meets these criteria before the trial judge may determine that the witness qualifies as an expert.<sup>72</sup> Trial judges are afforded great deference in determining the admissibility of expert testimony.<sup>73</sup> Appellate courts will reverse admission decisions only if a trial court has abused its discretion, that is, "drawn an erroneous conclusion in judgment, one clearly against the logic and effect of the facts and circumstances or the reasonable and actual deductions to be made from such evidence."<sup>74</sup>

Once the trial court determines that expert testimony is admissible, the witness may testify concerning his own observations, inferences, and conclusions if he has firsthand knowledge of the facts at issue between the contending parties.<sup>75</sup> If the expert witness has no firsthand knowledge, he may provide testimony based upon his knowledge as to facts in the record.<sup>76</sup> The expert witness, in the absence of personal knowledge, may express an opinion upon a hypothetical statement of facts supported by the evidence.<sup>77</sup>

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29-31 (2d ed. 1972). See generally Recent Development, *The Expert as Educator: A Proposed Approach to the Use of Battered Women Syndrome Expert Testimony*, 35 VAND. L. REV. 741, 746-49 (1982) [hereinafter cited as Recent Development, *Expert as Educator*].

<sup>67</sup>C. MCCORMICK, *supra* note 66, § 13, at 29; see Recent Development, *Expert as Educator*, *supra* note 66, at 747.

<sup>68</sup>C. MCCORMICK, *supra* note 66, § 13, at 30.

<sup>69</sup>*Id.* at 31 (footnote omitted).

<sup>70</sup>See Recent Development, *Expert as Educator*, *supra* note 66, at 748-49.

<sup>71</sup>See FED. R. EVID. 403. Although technically this requirement is a request for discretionary exclusion, for purposes of this Note it will be treated as an objection to the admission of evidence. A request for discretionary exclusion may be distinguished from an objection to the admission of evidence in that an objection asserts a right of the party to have the evidence excluded, while a request invokes the power of the trial judge to exclude the evidence for other reasons. C. WRIGHT & K. GRAHAM, *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5224 (1978).

<sup>72</sup>See M. SEIDMAN, *THE LAW OF EVIDENCE IN INDIANA* 21 (1977).

<sup>73</sup>See *City of Bloomington v. Holt*, 172 Ind. App. 650, 661, 361 N.E.2d 1211, 1218 (1977), *aff'd*, 181 Ind. App. 179, 391 N.E.2d 829 (1979); *Northern Ind. Pub. Serv. Co. v. Otis*, 145 Ind. App. 159, 199-200, 250 N.E.2d 378, 404 (1969).

<sup>74</sup>*Underhill v. Deen*, 442 N.E.2d 1136, 1139 (Ind. Ct. App. 1982) (citation omitted).

<sup>75</sup>*Id.* at 1139; *Senco Products, Inc. v. Riley*, 434 N.E.2d 561, 565 (Ind. Ct. App. 1982).

<sup>76</sup>*Senco Products, Inc. v. Riley*, 434 N.E.2d 561, 565 (Ind. Ct. App. 1982).

<sup>77</sup>*Id.*; *City of Indianapolis v. Robinson*, 427 N.E.2d 902, 907 (Ind. Ct. App. 1981).

### A. *The Subject Matter of the Testimony*

The first requirement for the admission of expert testimony relates to the subject matter of the testimony: "[T]he subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the ken of laymen. . . ."<sup>78</sup> This requirement limits the subject matter upon which an expert is permitted to testify. Courts are unwilling to admit expert testimony on matters within the common knowledge of the average person for fear that the "aura" of expertise will unduly influence the jury.<sup>79</sup> Expert testimony on subjects within the jury's ken is also objectionable because lay jurors are as competent as an expert to draw inferences from the facts.<sup>80</sup>

Indiana courts have readily accepted expert testimony on certain subject matter areas. Expert medical testimony is permitted to establish cause of death because the average person does not possess the skill or knowledge to make such a determination.<sup>81</sup> Medical experts are also allowed to give their opinions concerning the cause of physical ailments<sup>82</sup> as well as the effect and extent of a person's injuries.<sup>83</sup>

Expert testimony regarding an individual's mental condition is also admissible in Indiana courts. This type of testimony appears frequently in will contests where testamentary capacity is at issue<sup>84</sup> and in cases where the defendant invokes the insanity defense.<sup>85</sup> In Indiana, when an insanity defense is filed, the court is required by statute to appoint two or three psychiatrists to examine the defendant and provide expert testimony at trial.<sup>86</sup>

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<sup>78</sup>Davis v. Schneider, 182 Ind. App. 275, 283, 395 N.E.2d 283, 290 (1979); see M. SEIDMAN, *supra* note 72.

<sup>79</sup>See Recent Development, *Expert as Educator*, *supra* note 66, at 747.

<sup>80</sup>See M. SEIDMAN *supra* note 72, at 21.

<sup>81</sup>See Haskell & Barker Car Co. v. Erickson, 73 Ind. App. 657, 661-62, 128 N.E. 466, 467 (1920).

<sup>82</sup>William H. Stern & Son, Inc. v. Rebeck, 150 Ind. App. 444, 449, 277 N.E.2d 15, 19 (1971); Pennsylvania Co. v. Frund, 4 Ind. App. 469, 472-73, 30 N.E. 1116, 1117 (1892).

<sup>83</sup>Cerra v. McClanahan, 141 Ind. App. 469, 472-74, 229 N.E.2d 737, 739-40 (1967); Fort Wayne Transit, Inc. v. Shomo, 127 Ind. App. 542, 553-54, 143 N.E.2d 431, 437-38 (1957).

<sup>84</sup>See Underhill v. Deen, 442 N.E.2d 1136, 1139-40 (Ind. Ct. App. 1982); Conner v. First Nat'l Bank, 118 Ind. App. 173, 179-84, 76 N.E.2d 262, 265-67 (1947). Lay witnesses may also give their opinions concerning the mental condition of the testator. Rice v. Rice, 92 Ind. App. 640, 645-46, 175 N.E. 540, 542 (1931). This opinion testimony is permitted because lay witnesses may draw conclusions from the appearance and deportment of the testator which cannot be accurately described in words but which are a reliable basis for their opinions. See *id.* at 644, 175 N.E. at 541.

<sup>85</sup>See Williams v. State, 265 Ind. 190, 198-99, 352 N.E.2d 733, 741-42 (1976); Atkinson v. State, 181 Ind. App. 396, 403, 391 N.E.2d 1170, 1175-76 (1979), *aff'd*, 411 N.E.2d 651 (Ind. Ct. App. 1980). Opinions of lay persons are also admissible on the issue of the defendant's insanity. Unlike the expert witness who possesses specialized knowledge, the lay witness is permitted to testify because of his particular experience with the defendant. See McCall v. State, 273 Ind. 682, 688, 408 N.E.2d 1218, 1222 (1980).

<sup>86</sup>IND. CODE § 35-36-2-2 (1982).

If Indiana courts find an individual's mental condition to be an appropriate subject of expert testimony, then similarly the court should find the question of whether an alleged rape victim suffered from rape trauma syndrome to be a proper subject for expert testimony. Rape trauma syndrome is characterized by a common sequential pattern of behavioral and emotional reactions.<sup>87</sup> Those who are trained in the science of psychology, the study of "behavior, acts or mental processes of the mind, self or person,"<sup>88</sup> are uniquely qualified to identify this phenomenon in alleged victims of rape. The use of psychological evaluations may also reveal whether an individual has fabricated an incident.<sup>89</sup>

Conversely, the average person is unfamiliar with the crime of rape and its emotional and behavioral aftereffects. This lack of common knowledge and understanding is illustrated by the continued existence of societal myths about rape. For example, one prevalent myth is that the rape victim "asked for it."<sup>90</sup> This myth erroneously focuses on the sexual gratification aspect of rape when most researchers have found that rape is primarily an "act of violence with sex as the weapon."<sup>91</sup> Another widely accepted belief is that many accusations of rape are false.<sup>92</sup> However, it is difficult to substantiate that false reports of rape are greater than false reports of other crimes.<sup>93</sup> The fact that rape is one of the most under-reported crimes also suggests that this commonly held belief is untrue.<sup>94</sup> If the average person's knowledge of rape is tainted with these societal myths, it follows that the subject of rape trauma syndrome is beyond the knowledge and experience of the average juror. Thus, Indiana courts should permit expert testimony on the subject.

Other state courts which have considered rape trauma syndrome testimony as substantive proof of the crime of rape have decided the admissibility question under conservative evidence rules<sup>95</sup> as well as more liberal evidentiary requirements.<sup>96</sup> Missouri's corresponding evidentiary requirement is similar to the strict common law rule in force in Indiana.

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<sup>87</sup>See *supra* notes 32-63 and accompanying text.

<sup>88</sup>H. LIEBENSON & J. WEPMAN, *THE PSYCHOLOGIST AS A WITNESS* 23 (1964).

<sup>89</sup>See *id.* at 68.

<sup>90</sup>See *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 40, 428 A.2d 126, 138-39 (1981) (Larsen, J., dissenting); Notman & Nadelson, *supra* note 32, at 412; see also S. KATZ & M. MAZUR, *supra* note 3, at 137-51.

<sup>91</sup>See Burgess & Holmstrom, *supra* note 32, at 982; Groth & Burgess, *supra* note 26, at 401-02.

<sup>92</sup>See Notman & Nadelson, *supra* note 32, at 412; O'Neale, *supra* note 12, at 133-44; see also S. KATZ & M. MAZUR, *supra* note 3, at 205-14.

<sup>93</sup>See Tanford & Bocchino, *supra* note 12, at 546-47; Note, *Forcible Rape Case*, *supra* note 28, at 336-38.

<sup>94</sup>See *supra* notes 11-12 and accompanying text.

<sup>95</sup>See *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc).

<sup>96</sup>See *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978).

Missouri courts hold that expert testimony should not be admitted ““unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.””<sup>97</sup> In *State v. Taylor*,<sup>98</sup> the Supreme Court of Missouri found reversible error in the trial court’s admission of a psychiatrist’s opinion that the prosecutrix suffered from rape trauma syndrome arising out of an attack by the defendant.<sup>99</sup> The *Taylor* court concluded that the jury could determine whether intercourse was forcible based upon its own evaluation of the evidence.<sup>100</sup> Thus, the *Taylor* decision suggests that the subject of rape trauma syndrome is not beyond the ken of the average person.

Other state courts have addressed the admissibility of rape trauma syndrome expert testimony under a more liberal evidentiary requirement. Oregon, Kansas, and Minnesota have all essentially adopted the federal rules standard which permits expert testimony if it “will assist the trier-of-fact to understand the evidence or to determine a fact in issue.”<sup>101</sup> The application of this evidence rule by the state courts, however, has produced divergent results.

Courts in Oregon and Kansas have determined that expert testimony regarding rape trauma syndrome fulfills this evidentiary requirement. In *State v. LeBrun*,<sup>102</sup> the Oregon Court of Appeals found no error in the admission of a rape victim advocate’s testimony that the victim’s emotional state comported with that of most victims of sexual abuse.<sup>103</sup> Similarly, in *State v. Marks*,<sup>104</sup> the Supreme Court of Kansas held that expert testimony by a forensic psychiatrist that the victim suffered from the post-traumatic stress disorder known as rape trauma syndrome was admissible.<sup>105</sup> Although the testimony in *LeBrun* and *Marks* was not opposed on the grounds that the subject of rape trauma syndrome was inappropriate for expert testimony, these decisions permitting the admis-

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<sup>97</sup>*State v. Taylor*, 663 S.W.2d 235, 239 (Mo. 1984) (en banc) (quoting *Sampson v. Missouri Pac. R.R. Co.*, 560 S.W.2d 573, 586 (Mo. 1978) (en banc)). This is a well established rule in Missouri. See *Benjamin v. Metropolitan St. Ry. Co.*, 133 Mo. 274, 34 S.W. 590 (1896).

<sup>98</sup>663 S.W.2d 235 (Mo. 1984) (en banc).

<sup>99</sup>*Id.* at 239-40.

<sup>100</sup>*Id.* at 241.

<sup>101</sup>FED. R. EVID. 702. Oregon’s corresponding evidentiary rule is identical to Federal Rule 702. See OR. R. EVID. 702. Kansas’s correlating rule of evidence is not identical to the Federal Rule. See KAN. CIV. PROC. CODE ANN. § 60-456 (Vernon 1965). However, the author’s comments to the evidentiary rule state that Federal Rule of Evidence 702 is “substantially in accord” with the Kansas statute. KAN. CIV. PROC. CODE ANN. § 60-456 author’s comments (Vernon Supp. 1984). Minnesota, like Oregon, has an evidentiary rule identical to the Federal Rule. See MINN. R. EVID. 702.

<sup>102</sup>37 Or. App. 411, 587 P.2d 1044 (1978).

<sup>103</sup>*Id.* at 415-16, 587 P.2d at 1047.

<sup>104</sup>231 Kan. 645, 647 P.2d 1292 (1982).

<sup>105</sup>*Id.* at 653-55, 647 P.2d at 1299-1300.

sion of the testimony indicate that rape trauma syndrome expert testimony assists the trier of fact in rape prosecutions.<sup>106</sup>

The Supreme Court of Minnesota took a differing view in *State v. Saldana*.<sup>107</sup> The *Saldana* court, applying an identical evidentiary rule, concluded that the jury was as capable as the expert of considering the evidence and deciding whether the alleged rape occurred.<sup>108</sup> Accordingly, the court determined that expert testimony concerning rape trauma syndrome was "of no help to the jury,"<sup>109</sup> and hence did not satisfy Minnesota's evidentiary requirements.<sup>110</sup> Relying on its reasoning in *Saldana*, the Minnesota court in *State v. McGee*<sup>111</sup> found fundamental error in the admission of a doctor's testimony that the behavioral and emotional pattern of the complainant was consistent with rape trauma syndrome.<sup>112</sup> Thus, although the courts in *LeBrun*, *Marks*, *Saldana*, and *McGee* employed similar evidentiary rules, the outcome of the cases are in conflict. These divergent results are inexplicable unless attributed to the peculiarities of the particular courts.

Indiana courts, however, are not bound by rulings of other state courts. Indiana courts have permitted expert testimony on the subject of an individual's mental condition.<sup>113</sup> Similarly, because rape trauma syndrome is a psychological phenomenon which can be accurately identified only by those with training in psychology,<sup>114</sup> Indiana courts should find that the subject of rape trauma syndrome is appropriate for expert testimony.

### B. Qualification of Expert

Indiana's second admissibility requirement for expert testimony is that "the witness must have sufficient skill, knowledge or experience in that field as to make it appear that his opinion or inference will probably aid the trier in his search for the truth."<sup>115</sup> There is no black letter rule as to the amount of knowledge which a witness must possess before qualifying as an expert in a given field.<sup>116</sup> The requisite competency may

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<sup>106</sup>Kansas has a specific statute which states that "[u]nless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission." KAN. CIV. PROC. CODE ANN. § 60-456(c) (Vernon 1965).

<sup>107</sup>324 N.W.2d 227 (Minn. 1982).

<sup>108</sup>*Id.* at 230-31.

<sup>109</sup>*Id.* at 229.

<sup>110</sup>*Id.* at 230-31.

<sup>111</sup>324 N.W.2d 232 (Minn. 1982).

<sup>112</sup>*Id.* at 233.

<sup>113</sup>See *supra* notes 84-86.

<sup>114</sup>See *supra* notes 88-89 and accompanying text.

<sup>115</sup>*Davis v. Schneider*, 182 Ind. App. 275, 283-84, 395 N.E.2d 283, 290 (1979) (citations omitted); see M. SEIDMAN, *supra* note 72.

<sup>116</sup>*State v. Vaughan*, 234 Ind. 221, 228, 184 N.E.2d 143, 147 (1962); *City of Indianapolis v. Robinson*, 427 N.E.2d 902, 906 (Ind. Ct. App. 1981).

be obtained through either formal education or practical experience.<sup>117</sup> For example, the Indiana Court of Appeals in *State v. Totty*,<sup>118</sup> an automobile accident case, admitted expert testimony from an engineer who held bachelor of science, master of science, and doctor of philosophy degrees in engineering.<sup>119</sup> In *Roberts v. Wabash Life Insurance Co.*,<sup>120</sup> the court found no error in permitting a witness, who had been a fire and explosion investigator for more than thirty years, to testify as an expert concerning the cause of death of a body found amidst the debris of a burned building.<sup>121</sup>

Moreover, the qualifications of an expert or the extent of his knowledge does not necessarily go to the admissibility of the expert testimony, but rather to the weight of the testimony.<sup>122</sup> In *Travelers Indemnity Co. v. Armstrong*,<sup>123</sup> the plaintiff insured brought an action against the insurer to recover the amount of the repair estimate of a fire-damaged house. The plaintiff sought to admit the testimony of the local bank president who was familiar with real estate values and with the house in question, although the president had not seen the interior of the house since substantial remodeling had occurred. The trial court permitted the bank president to express his opinion regarding the value of the house before and after the fire. The defendant raised the objection that the bank president was not competent to testify because he had not seen the interior of the house immediately prior to the fire. The appellate court found no error in the admission of the testimony, stating that an expert's competency is to be determined by his knowledge of the subject matter generally while his knowledge of the specific subject at issue goes to the weight of the testimony.<sup>124</sup>

Of the courts which have considered the admissibility of rape trauma syndrome testimony, no court has found that an expert was unqualified to testify on the subject.<sup>125</sup> In *State v. McGee*, the prosecutor presented the testimony of a physician which included a description of rape trauma syndrome.<sup>126</sup> The testimony in *State v. Marks* was introduced by a forensic psychiatrist.<sup>127</sup> Qualifying as a counselor of sexual assault victims, the

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<sup>117</sup>Gary v. State, 400 N.E.2d 215, 219 (Ind. Ct. App. 1980); see *State v. Maudlin*, 416 N.E.2d 477, 481 (Ind. Ct. App. 1981).

<sup>118</sup>423 N.E.2d 637 (Ind. Ct. App. 1981).

<sup>119</sup>*Id.* at 643.

<sup>120</sup>410 N.E.2d 1377 (Ind. Ct. App. 1980).

<sup>121</sup>*Id.* at 1386.

<sup>122</sup>*Reid v. State*, 267 Ind. 555, 560, 372 N.E.2d 1149, 1152 (1978); *City of Indianapolis v. Robinson*, 427 N.E.2d 902, 906 (Ind. Ct. App. 1981).

<sup>123</sup>442 N.E.2d 349 (Ind. 1982).

<sup>124</sup>*Id.* at 365.

<sup>125</sup>See *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc); *State v. LeBrun*, 37 Or. App. 411, 587 P.2d 1044 (1978).

<sup>126</sup>324 N.W.2d 232, 233 (Minn. 1982).

<sup>127</sup>231 Kan. 645, 653, 647 P.2d 1292, 1298 (1982).

expert in *State v. Saldana* was the director of a victim assistance program and held a bachelor's degree in psychology and social work.<sup>128</sup> In *State v. Taylor*,<sup>129</sup> expert testimony was provided by a psychiatrist who had fifteen years of experience and had treated over 300 victims of rape and sexual assault.<sup>130</sup> The rape victim advocate in *State v. LeBrun* had observed over 100 reported rape victims and had previously worked with sexually and physically abused children and adolescents. In addition, she held a master's degree in social work.<sup>131</sup>

Indiana courts have yet to address the issue of the admissibility of rape trauma syndrome expert testimony, and thus no guidelines exist for the qualification of experts to testify upon this subject. Conceivably, in order to qualify as an expert, the court will require a witness to have training in psychology and possess knowledge concerning rape and rape trauma syndrome. Indiana courts may also require the witness to have experience in working with rape victims, although this could be a factor affecting the weight of the testimony rather than its admissibility.

### C. Reliability Requirement

Indiana's third requirement for the admission of expert testimony is that the state of the pertinent art of scientific knowledge must permit an expert to assert a reasonable opinion.<sup>132</sup> Courts frequently require a scientific principle upon which expert testimony is based to be "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>133</sup> This test originated in *Frye v. United States*,<sup>134</sup> one of the first cases to discuss the admissibility of polygraph examinations.<sup>135</sup> Another possible reliability standard is the test for the admissibility of expert testimony which was generally in use prior to the *Frye* decision. Under this practice, "[a]ny relevant conclusions supported by a qualified expert witness should be received unless there are distinct reasons for exclusion."<sup>136</sup> In particular, the probative dangers of prejudice, misleading the jury, and undue consumption of time may outweigh the probative value of the expert's conclusions.<sup>137</sup>

As between the two admissibility standards, Indiana courts will most

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<sup>128</sup>324 N.W.2d 227, 229 (Minn. 1982).

<sup>129</sup>663 S.W.2d 235 (Mo. 1984) (en banc).

<sup>130</sup>*Id.* at 236.

<sup>131</sup>37 Or. App. 411, 416, 587 P.2d 1044, 1047 (1978).

<sup>132</sup>C. McCORMICK, *supra* note 66, § 13, at 31; *see Noblesville Casting Div. v. Prince*, 438 N.E.2d 722, 727 (Ind. 1982).

<sup>133</sup>*Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923); *see, e.g., People v. Kelly*, 17 Cal.3d 24, 31-33, 549 P.2d 1240, 1244-45, 130 Cal. Rptr. 144, 148-49 (1976); *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980).

<sup>134</sup>293 F. 1013 (D.C. Cir. 1923).

<sup>135</sup>*See id.*

<sup>136</sup>C. McCORMICK, *supra* note 66, § 203, at 491 (footnote omitted).

<sup>137</sup>*Id.*

likely subject rape trauma syndrome expert testimony to the general acceptance requirement of *Frye*.<sup>138</sup> However, even if the *Frye* standard is applied, expert testimony concerning rape trauma syndrome may still be challenged on the basis of prejudicing or misleading the jury and unduly consuming time.<sup>139</sup> Two recent Indiana decisions considering the admissibility of testimony based upon new scientific principles suggest that Indiana courts will require rape trauma syndrome to gain general acceptance in its field before allowing expert testimony on the syndrome to be admitted as evidence. In *Peterson v. State*,<sup>140</sup> the supreme court addressed the issue of admissibility of identification testimony of a witness who was able to identify the defendant only after undergoing hypnosis. The court found error in the admission of the testimony, extensively quoting opinions of two other states which found that experts in the field do not view hypnosis as a scientifically reliable and accurate method of improving memory capability.<sup>141</sup> In *Cornett v. State*,<sup>142</sup> the court, faced with expert testimony concerning voice spectrography,<sup>143</sup> endorsed the policy underlying *Frye* that courts should restrain the introduction of expert testimony until the experts are in agreement about the reliability of a scientific technique.<sup>144</sup>

In deciding whether a new technique satisfies the *Frye* requirement, Indiana courts have considered opinions of other jurisdictions, articles from law reviews and scholarly journals, and testimony from experts in the field as to whether the technique has gained general acceptance.<sup>145</sup> The courts in *Taylor*, *Saldana*, and *Marks* employed the *Frye* test to determine the admissibility of the proffered expert testimony on rape trauma syndrome. Nevertheless, the application of this standard produced divergent results. In *State v. Taylor*, the Missouri court questioned the acceptance and soundness of the scientific technique upon which rape trauma syndrome is based.<sup>146</sup> In *State v. Saldana*, the Minnesota court stated that

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<sup>138</sup>See *Cornett v. State*, 540 N.E.2d 498, 502-03 (Ind. 1983); *Peterson v. State*, 448 N.E.2d 673, 676 (Ind. 1983); *Jones v. State*, 425 N.E.2d 128, 131 (Ind. 1981).

<sup>139</sup>See *infra* notes 166-219 and accompanying text.

<sup>140</sup>448 N.E.2d 673 (Ind. 1983).

<sup>141</sup>*Id.* at 676-78. The actual holding of the court was based on the inability of the defendant to exercise his due process rights to confront and cross-examine the witness. *Id.* at 678-79.

<sup>142</sup>450 N.E.2d 498 (Ind. 1983).

<sup>143</sup>Voice spectrography is founded on the theory that voices, like fingerprints, are unique to individuals. *Id.* at 500. A voiceprint, also referred to as a speech spectrogram, is a visual record of the sound waves of a human voice. Some experts believe that voiceprints and tape recordings of several people's voices may be compared to identify a certain person's voice. On the other hand, some scientists question the reliability of this identification technique. See *id.* at 500-03.

<sup>144</sup>*Id.* at 503.

<sup>145</sup>See, e.g., *Cornett v. State*, 450 N.E.2d 498 (Ind. 1983); *Peterson v. State*, 448 N.E.2d 673 (Ind. 1983).

<sup>146</sup>663 S.W.2d 235, 240 (Mo. 1984) (en banc).

"[r]ape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred."<sup>147</sup> The court focused on the fact that victims of nonrape crimes or traumatic events may experience some of the symptoms of rape trauma syndrome.<sup>148</sup> The *Saldana* court also found fault with rape trauma syndrome because it does not occur in every case.<sup>149</sup> In contrast, the Kansas court in *State v. Marks* found that rape trauma syndrome was generally accepted as the common reaction of victims of sexual assault.<sup>150</sup> The *Marks* court based its decision upon an examination of literature on the subject, including literature which the *Saldana* court used to support its contrary view.<sup>151</sup>

The dissenting opinion in *McGee* also addressed the issue of whether rape trauma syndrome possessed the requisite acceptance and reliability to satisfy the *Frye* test. The *McGee* dissent relied on rape trauma syndrome's substantial data base to support the conclusion that the syndrome was "accepted as reliable within the medical community."<sup>152</sup>

Indiana courts may also consider decisions from other jurisdictions where rape trauma syndrome was utilized for purposes other than as substantive proof of rape. For example, in *In re Pittsburgh Action Against Rape*,<sup>153</sup> the dissent relied on rape trauma syndrome to support the need for the court's recognition of an absolute privilege for confidential communications made in the rape victim/rape crisis counselor relationship.<sup>154</sup> In *White v. Violent Crimes Compensation Board*,<sup>155</sup> the plaintiff's suffering from rape trauma syndrome justified the court in tolling the limitation period of New Jersey's Criminal Injuries Compensation Act, thereby enabling the plaintiff to comply with the Act's timely filing requirement.<sup>156</sup> In *State v. Mackie*,<sup>157</sup> the prosecutor showed that the victim suffered from

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<sup>147</sup>324 N.W.2d 227, 229 (Minn. 1982).

<sup>148</sup>*Id.* The court cited the American Psychiatric Association's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS to support this proposition. The specific entry in the manual has generated opposition to the reliability of rape trauma syndrome because it mentions rape as only one of a number of stressors which may cause post-traumatic stress disorder. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980). While the same general responses follow nearly any psychologically stressful event, there is some authority that victims of other crimes do not suffer from the specific symptoms of rape trauma syndrome with any significant degree of regularity. For example, rape victims tend to blame themselves for the occurrence of the rape while victims of other crimes generally experience little anguish over the role they might have played in the occurrence of the crime. See *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 42-43, 428 A.2d 126, 138 (1981) (Larsen, J., dissenting).

<sup>149</sup>324 N.W.2d at 230.

<sup>150</sup>231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982).

<sup>151</sup>See *id.*; *State v. Saldana*, 324 N.W.2d at 229-30. Both opinions cite *Rape and Sexual Assault* by C. Warner and literature authored by Burgess and Holmstrom.

<sup>152</sup>324 N.W.2d 232, 233 (Minn. 1982) (Wahl, J., dissenting) (footnote omitted).

<sup>153</sup>494 Pa. 15, 428 A.2d 126 (1981).

<sup>154</sup>*Id.* at 34-63, 428 A.2d at 135-50 (Larsen, J., dissenting).

<sup>155</sup>76 N.J. 368, 388 A.2d 206 (1978).

<sup>156</sup>*Id.* at 388, 388 A.2d at 216.

<sup>157</sup>\_\_\_\_ Mont. \_\_\_\_, 622 P.2d 673 (Mont. 1981).

rape trauma syndrome in order to render her prior out-of-court statements admissible under the excited utterance exception to the hearsay rule.<sup>158</sup> These decisions, although not addressing the admissibility of rape trauma syndrome testimony in rape prosecutions, do establish that rape trauma syndrome has received a degree of acceptance by the courts.<sup>159</sup>

Articles from law reviews and scientific journals may be reviewed by Indiana courts in determining whether rape trauma syndrome satisfies the *Frye* standard. Many articles have been published which discuss the psychological phenomenon of rape trauma syndrome.<sup>160</sup> A consensus of these sources shows that virtually all rape victims experience some of the emotions that are a part of rape trauma syndrome,<sup>161</sup> although there is not complete agreement as to the sequence of the symptom responses.<sup>162</sup> The literature also establishes that the concept of rape trauma syndrome was developed through scientific study and empirical documentation. The fact that others in the field have duplicated the results of the original researchers provides additional assurance of the acceptance and reliability of rape trauma syndrome.<sup>163</sup>

After considering cases, literature, and testimony on the controversial syndrome, Indiana courts must decide whether rape trauma syndrome possesses the requisite general acceptance to satisfy the *Frye* standard. Other states applying the *Frye* test to this syndrome have not reached testimony concerning rape trauma syndrome as they choose. However, the literature on the subject suggests that the majority of rape victims develop psychiatric symptoms and behavioral changes characteristic of rape trauma syndrome.<sup>165</sup> As further research is completed and as courts in other jurisdictions accept the validity of rape trauma syndrome, Indiana courts may be persuaded to adopt the view that rape trauma syndrome is reliable and sufficiently accurate to be admitted into evidence.

#### D. Probative Value Versus Probative Dangers

A fourth requirement for the admission of expert testimony is that the probative value of the proffered testimony must not be outweighed by the probative dangers which might flow from its admission.<sup>166</sup> The

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<sup>158</sup>*Id.* at 675. Technically, the court determined that the victim's statements did not constitute hearsay under the Montana Rules of Evidence. *Id.*

<sup>159</sup>For additional cases which involve the psychological phenomenon of rape trauma syndrome, see *People v. Matthews*, 91 Cal. App. 3d 1018, 154 Cal. Rptr. 628 (1979) and *Alphonso v. Charity Hosp.*, 413 So. 2d 982 (La. Ct. App. 1982).

<sup>160</sup>See *supra* notes 32-63.

<sup>161</sup>Comment, *Rape Victim*, *supra* note 32, at 543.

<sup>162</sup>See, e.g., *Burgess & Holmstrom*, *supra* note 32, at 982; *Sutherland & Scherl*, *supra* note 32, at 504-09.

<sup>163</sup>See *supra* notes 32-63.

<sup>164</sup>See *supra* notes 146-52.

<sup>165</sup>See S. KATZ & M. MAZUR, *supra* note 3, at 215-31.

<sup>166</sup>See FED. R. EVID. 403. See *supra* note 71.

Indiana rule which embodies this particular challenge is found in *Smith v. Crouse-Hinds Co.*:<sup>167</sup>

There are counterbalancing factors which may cause the court to exclude evidence which is *prima facie* relevant because they outweigh the probative value of the evidence offered. These factors have been characterized as:

- (1) the danger that the evidence offered will unduly arouse the emotions of the jury to prejudice or sympathy;
- (2) the probability that the evidence and the answering evidence it provokes will create a side issue that is unduly time consuming or distracting to the jury;
- (3) the likelihood that the evidence will confuse or mislead the jury;
- (4) the likelihood that the evidence will unfairly surprise the opponent.<sup>168</sup>

After stating the Indiana rule, the *Smith* court cited to Federal Rule of Evidence 403.<sup>169</sup> Thus, interpretations of the Federal Rule are appropriately utilized in construing Indiana's corresponding evidentiary rule.

Federal Rule 403 excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>170</sup> Rule 403 is not a rigid exclusionary rule but instead requires the trial judge to balance the probative worth of the proffered evidence against the harmful consequences that might arise from its admission.<sup>171</sup> Under Rule 403, trial judges have been given much discretion in controlling the introduction of evidence.<sup>172</sup> Also, the specific circumstances of each case play a major role in the determination of whether proffered evidence satisfies this evidentiary requirement.<sup>173</sup> The combination of the trial judge's broad discretionary power and the fact-specific nature of this determination has led one commentator to suggest that the trial judge's decision on this matter is practically unreviewable.<sup>174</sup> An additional implication is that past

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<sup>167</sup>175 Ind. App. 679, 373 N.E.2d 923 (1978).

<sup>168</sup>*Id.* at 682, 373 N.E.2d at 926 (citations omitted).

<sup>169</sup>*Id.*

<sup>170</sup>FED. R. EVID. 403.

<sup>171</sup>J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 403[01] (1982).

<sup>172</sup>*Id.*

<sup>173</sup>*Id.*

<sup>174</sup>*See id.* Wright and Graham state that "[t]his seems something of an overstatement." C. WRIGHT & K. GRAHAM, *supra* note 71, § 5224, at 323. However, they recognize that the rule implies a large amount of discretion on the part of the trial judge and that appellate courts give great deference to the trial judge's Rule 403 determinations. *Id.*

holdings are useless in the Rule 403 weighing process.<sup>175</sup> Nevertheless, other courts' reasoning and treatment of the counterbalancing factors may be considered by a trial judge who is confronted with a similar type of evidence.

*1. Probative Value.*—According to Professor Wright, American law contains no rules for determining the probative worth of evidence.<sup>176</sup> A California court, construing a rule of evidence similar to Federal Rule 403, stated that the chief components of probative value are relevance, materiality, and necessity.<sup>177</sup> Indiana courts have defined the relevancy of evidence as whether such evidence has the logical tendency to prove a material fact in dispute between the parties.<sup>178</sup> This definition incorporates the concept of materiality into that of relevancy.

Applying this definition to rape trauma syndrome testimony, Indiana courts should find the testimony relevant to a material issue in rape prosecutions. Virtually all rape victims experience some of the symptoms of the common sequential pattern of behavioral and emotional reactions identified as rape trauma syndrome.<sup>179</sup> The fact that a victim of an alleged rape suffered from rape trauma syndrome thus has a tendency to prove that the victim did not consent to sexual intercourse, an element of the crime of rape.<sup>180</sup>

Some of the courts which have discussed the admissibility of rape trauma syndrome testimony found that the testimony was relevant to disputed issues in criminal prosecutions for rape. In *State v. Marks*, the Supreme Court of Kansas held that expert psychiatric testimony concerning a victim's suffering from rape trauma syndrome was relevant when the defendant claimed consent.<sup>181</sup> Although finding rape trauma syndrome testimony inadmissible, the Missouri court in *State v. Taylor* conceded that the existence of psychological symptoms in a rape victim which correspond to the symptoms of a traumatic stress reaction is probative of the issue of force.<sup>182</sup>

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<sup>175</sup>C. WRIGHT & K. GRAHAM, *supra* note 71, § 5224, at 322. Wright and Graham quote the Comment to the Model Code: "The application of this Rule should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as precedent in another." *Id.*

<sup>176</sup>*Id.* at § 5214, at 265.

<sup>177</sup>*People v. Delgado*, 32 Cal. App. 3d 242, 249, 108 Cal. Rptr. 399, 404-05 (1973), *overruled on other grounds*, *People v. Rist*, \_\_\_\_ Cal. 3d \_\_\_\_, 545 P.2d 833, 841, 127 Cal. Rptr. 457, 465 (1976).

<sup>178</sup>*Rust v. Guinn*, 429 N.E.2d 299, 305 (Ind. Ct. App. 1981); *see also* M. SEIDMAN, *supra* note 72, at 63.

<sup>179</sup>*See* Comment, *Rape Victim*, *supra* note 32, at 543; *see also supra* notes 32-63 and accompanying text.

<sup>180</sup>*See* Comment, *Scientific Evidence*, *supra* note 4, at 220-22.

<sup>181</sup>231 Kan. 645, 654, 647 P.2d 1292, 1299 (1982).

<sup>182</sup>*State v. Taylor*, 663 S.W.2d 235, 240 (Mo. 1984) (en banc). The *Taylor* court later stated that expert testimony that a victim exhibits characteristics consistent with those resulting

In addition to relevancy and materiality, Indiana courts should consider the need for the proffered evidence in making their assessment of probative value. The Advisory Committee's note to Rule 403 states that a court can balance "the probative value of and need for evidence against the harm likely to result from its admission."<sup>183</sup> The factors of "waste of time" and "cumulative evidence" in Rule 403 also imply that the trial judge should consider the availability of other evidence in completing the balancing test.<sup>184</sup>

The case of *State v. Marks* illustrated one facet of the "need" component. In *Marks*, the victim sustained no bruises or marks from the alleged attack except for a lacerated area near her vagina.<sup>185</sup> The prosecutor, with little physiological evidence to support the inference of rape, introduced expert testimony regarding the existence of rape trauma syndrome in the victim subsequent to the incident.<sup>186</sup> Because no other physiological evidence was available, the prosecutor relied on psychiatric evidence to bolster the case.

In contrast, the court in *State v. Saldana* found there was no need for rape trauma syndrome expert testimony because the jurors were competent to consider the evidence and decide whether rape had occurred.<sup>187</sup> Accordingly, the court assigned little probative value to the testimony.<sup>188</sup> In turn, the danger of unfair prejudice outweighed the small amount of probative value and the court found the expert testimony inadmissible.<sup>189</sup> Thus, in determining the admissibility of expert testimony on rape trauma syndrome, the trial court will assess the value of such testimony in terms of need.

The probative value of proffered evidence is also affected by public policy considerations.<sup>190</sup> A definite policy supports the admission of expert testimony on rape trauma syndrome. As stated in *In re Pittsburgh Action Against Rape*, there is a "compelling public interest in encouraging victims of violent crimes to come forward."<sup>191</sup> Of the four major violent crimes, rape is the most under-reported.<sup>192</sup> The admission of expert testimony concerning rape trauma syndrome should result in more rape prosecutions and convictions as well as a changed public attitude toward

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from a traumatic stress reaction would have no relevancy. *Id.* However, the court did not appear to be addressing relevancy, but rather was concluding that the probative value of the testimony would be outweighed by its tendency to create prejudice and confusion.

<sup>183</sup>FED. R. EVID. 403 advisory committee note.

<sup>184</sup>C. WRIGHT & K. GRAHAM, *supra* note 71, § 5214, at 269.

<sup>185</sup>231 Kan. at 647, 647 P.2d at 1295.

<sup>186</sup>*Id.* at 653-54, 647 P.2d at 1298-99.

<sup>187</sup>324 N.W.2d 227, 230 (Minn. 1982); *see State v. Taylor*, 663 S.W.2d 235, 241 (Mo. 1984) (en banc).

<sup>188</sup>324 N.W.2d at 230.

<sup>189</sup>*Id.* at 230-31.

<sup>190</sup>J. WEINSTEIN & M. BERGER, *supra* note 171, at ¶ 403[01].

<sup>191</sup>494 Pa. 15, 24, 428 A.2d 126, 130 (1981).

<sup>192</sup>*See supra* notes 9-12 and accompanying text.

victims who do not display physiological signs of the attack.<sup>193</sup> A greater reporting of the crime of rape should then follow. Because the admission of rape trauma syndrome expert testimony furthers the policy of encouraging victims to report the occurrence of rape, Indiana courts should increase their assessment of the probative value of rape trauma syndrome testimony.

2. *Countervailing Factors*.—Indiana courts must also assess the probative dangers that will result from the admission of rape trauma syndrome expert testimony.<sup>194</sup> The Supreme Court of Missouri in *Taylor* and the Supreme Court of Minnesota in *Saldana* and *McGee* discussed evidentiary rules similar to that of Rule 403. The countervailing arguments against admissibility identified by the defendants were undue prejudice, confusion of the issues, and misleading the jury.<sup>195</sup>

As explained in the Advisory Committee's note on Rule 403, unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly . . . an emotional one."<sup>196</sup> This definition is similar to one of Indiana's countervailing factors which focuses on the undue arousal of the jury's emotions.<sup>197</sup> Judge Weinstein, in his treatise on the Federal Rules, commented on unfair prejudice: "Evidence that appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action may cause a jury to base its decision on something other than the established propositions in the case."<sup>198</sup> Unfair prejudice may also be based on inappropriate logic.<sup>199</sup>

In *State v. Saldana*, the Supreme Court of Minnesota ruled that expert testimony regarding rape trauma syndrome "produces an extreme danger of unfair prejudice."<sup>200</sup> The court, however, did not criticize the expert testimony because it appealed to the jury's emotions. Rather, the *Saldana* court seemed to find fault with the logic behind the use of the testimony in the case.<sup>201</sup> The court noted that the factual question for the jury's determination was whether the alleged rape occurred.<sup>202</sup> According to

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<sup>193</sup>See *supra* notes 16-31 and accompanying text.

<sup>194</sup>See *Smith v. Crouse-Hinds Co.*, 175 Ind. App. at 682, 373 N.E.2d at 926; J. WEINSTEIN & M. BERGER, *supra* note 171, at ¶¶ 403[03]-[04]; C. WRIGHT & K. GRAHAM, *supra* note 71, at §§ 5215-20.

<sup>195</sup>See *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc). Because the countervailing factors of prejudice, confusion, and misleading the jury tend to overlap, courts often discuss the three factors in terms of prejudice. C. WRIGHT & K. GRAHAM, *supra* note 71, at 274. The Minnesota Supreme Court appears to have taken this approach in *Saldana* and *McGee*. See *State v. McGee*, 324 N.W.2d at 234; *State v. Saldana*, 324 N.W.2d at 229-30. For purposes of this Note, however, prejudice is discussed as a separate category.

<sup>196</sup>FED. R. EVID. 403 advisory committee note.

<sup>197</sup>See *supra* note 168 and accompanying text.

<sup>198</sup>J. WEINSTEIN & M. BERGER, *supra* note 171, at ¶ 403[03] (footnotes omitted).

<sup>199</sup>C. WRIGHT & K. GRAHAM, *supra* note 71, § 5215, at 275-77.

<sup>200</sup>324 N.W.2d at 229.

<sup>201</sup>*Id.* at 229-30.

<sup>202</sup>*Id.* at 229.

*Saldana*, the manner in which most people react to rape and whether this particular victim's reactions were typical should not influence the jury's decision.<sup>203</sup> However, the court in *Marks* refuted the *Saldana* argument of bad logic, finding that evidence of rape trauma syndrome supported the inference that the victim had been raped.<sup>204</sup> Thus, no court has found that rape trauma syndrome expert testimony unduly aroused the jury's emotions, though the logical basis for the use of such testimony has been questioned.<sup>205</sup>

Two additional countervailing factors to be included in the Rule 403 balancing test are confusion of the issues and misleading the jury.<sup>206</sup> These two factors are not easily distinguishable.<sup>207</sup> Dean McCormick seems to combine "confusion" and "misleading" when he states that evidence may be excluded when "the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues."<sup>208</sup>

Under the category of confusing and misleading the jury, courts are hesitant to admit evidence possessing an aura of scientific infallibility.<sup>209</sup> In *State v. Taylor*, the court found reversible error in the trial court's admission of rape trauma syndrome evidence.<sup>210</sup> In making its determination, the *Taylor* court stated that "a hazard exists from 'the misleading aura of certainty' that surrounds scientific evidence."<sup>211</sup> Similarly, in *State v. Saldana*, the court held that the defendant was unfairly prejudiced by the admission of expert testimony concerning rape trauma syndrome which created an "aura of specific reliability and trustworthiness."<sup>212</sup> The *Saldana* court further found that the admission of such testimony would inevitably result in a battle of experts, invading the province of the jury and confusing the issues which the jury must determine.<sup>213</sup>

The dissent in *State v. McGee* also recognized the countervailing factors present in expert testimony concerning rape trauma syndrome.<sup>214</sup> However, it noted that such dangers may be checked by defense counsel's ability to cross-examine.<sup>215</sup> In *McGee*, defendant's counsel was able to

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<sup>203</sup>*Id.* at 229-30; see *State v. Taylor*, 663 S.W.2d at 241.

<sup>204</sup>See *State v. Marks*, 231 Kan. at 654, 647 P.2d at 1299 (expert psychiatric testimony regarding rape trauma syndrome is relevant in a criminal prosecution for rape and sodomy where the defense is consent).

<sup>205</sup>The court in *State v. Taylor* recognized the inherent danger of prejudice which is created by the status of an expert. 663 S.W.2d at 240.

<sup>206</sup>FED. R. EVID. 403. Indiana's corresponding evidentiary rule also includes these two countervailing factors. See *supra* note 168 and accompanying text.

<sup>207</sup>J. WEINSTEIN & M. BERGER, *supra* note 171, at ¶ 403[04].

<sup>208</sup>C. MCCORMICK, *supra* note 66, § 185, at 439 (footnote omitted).

<sup>209</sup>J. WEINSTEIN & M. BERGER, *supra* note 171, at ¶ 403[04].

<sup>210</sup>663 S.W.2d at 241-42.

<sup>211</sup>*Id.* at 241 (quoting *State v. Stout*, 478 S.W.2d 368, 372 (Mo. 1982)).

<sup>212</sup>324 N.W.2d at 230.

<sup>213</sup>*Id.*

<sup>214</sup>324 N.W.2d at 234 (Wahl, J., dissenting).

<sup>215</sup>*Id.*

elicit testimony from the expert that the victim's symptomatic pattern may have been caused by events in her life prior to the alleged criminal act. The countervailing dangers were thereby lessened and the expert testimony should have been admissible.<sup>216</sup> Thus, rape trauma syndrome expert testimony has the potential to create Rule 403 countervailing dangers. However, these probative dangers may be controlled to some degree by the effective use of cross-examination.

3. *The Balancing Test.*—Rule 403 requires the trial judge to balance the costs of the evidence against its benefits.<sup>217</sup> If the judge concludes that the probative value of the tendered evidence is not “substantially outweighed” by the probative dangers that will accompany its admission, the evidence must be admitted. Nevertheless, if the probative value is outweighed by one or more of the countervailing factors, the trial judge then has the discretion to exclude the evidence.<sup>218</sup> When in doubt, the trial judge should probably admit the evidence as policy favors the admissibility of evidence.<sup>219</sup>

It is difficult to predict whether expert testimony concerning rape trauma syndrome can satisfy Indiana's evidentiary requirement similar to Federal Rule 403. If the trial court, however, takes into account the elements of relevance, need, and substantive policy in the assessment of probative value, cases will certainly occur where the probative worth of rape trauma syndrome expert testimony will not be substantially outweighed by countervailing factors. Provided other evidentiary requirements are met, Indiana courts should then admit rape trauma syndrome testimony into evidence.

#### IV. CONCLUSION

Expert testimony concerning rape trauma syndrome could be found admissible under Indiana's current evidence rules. To satisfy Indiana's first requirement for expert testimony, the trial judge must conclude that the subject of rape trauma syndrome is beyond the knowledge or experience of the average laymen. Rape trauma syndrome is a psychological phenomenon, and individuals possessing training in psychology are uniquely qualified to identify this syndrome in alleged victims of rape. The continued existence of unfounded myths about rape further supports the conclusion that the general public does not understand either the crime of rape or its aftereffects. Indiana's second requirement is that the witness

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<sup>216</sup>*Id.*

<sup>217</sup>C. WRIGHT & K. GRAHAM, *supra* note 71, § 5214, at 263.

<sup>218</sup>*See id.* at 263-64. Wright and Graham characterize Rule 403 as requiring a two-step process of balancing and then discretionary judgment. *Id.* at 264. *See* J. WEINSTEIN & M. BERGER, *supra* note 171, at ¶ 403[01].

<sup>219</sup>*See* J. WEINSTEIN & M. BERGER, *supra* note 171, at ¶ 403[01]; C. WRIGHT & K. GRAHAM, *supra* note 71, § 5214, at 265.

must possess sufficient skill, knowledge, or experience in the field to qualify as an expert. The witness may acquire the necessary competency through formal education or practical experience. Regarding the reliability requirement of new scientific techniques, Indiana's third evidentiary requirement, cases conflict on whether rape trauma syndrome has gained the requisite general acceptance. However, with increasing research and publication of literature supporting the existence of rape trauma syndrome, this issue may soon be definitively determined. The fourth requirement for the admission of expert testimony is that the probative value of the proffered testimony must not be outweighed by the probative dangers which might arise from its admission. If the trial court considers the factors of relevance, need, and substantive policy in the assessment of probative value, expert testimony regarding rape trauma syndrome will, in certain instances, satisfy this evidentiary requirement. Thus, it appears that Indiana's existing evidentiary rules do not preclude the admission of expert testimony on rape trauma syndrome as circumstantial evidence to support the inference of rape.

Although admissible under Indiana's rules of evidence, rape trauma syndrome testimony should not be presented in every rape prosecution where the victim has received assistance from a qualified expert. Expert psychological testimony should definitely not be introduced when the particular expert feels hesitant about the diagnosis of rape trauma syndrome. In appropriate cases, however, expert testimony regarding the existence of rape trauma syndrome would be an excellent evidentiary tool to assist the prosecutor in carrying a very heavy burden of proof in prosecutions for sexual assault. The availability of such testimony and its acceptance by the court would allow more rape cases to endure the prosecutor's screening process. A greater number of rape convictions would also occur. In addition, the admission of rape trauma syndrome expert testimony and the resulting convictions should produce public awareness of rape trauma syndrome as a valid indicator of rape. This public awareness, in turn, would tend to encourage victims to report the occurrence of rape.

Thus, in appropriate cases, prosecutors in Indiana should introduce expert testimony concerning rape trauma syndrome. Moreover, Indiana courts must find this form of evidence admissible. Rape is a violent crime which traumatizes thousands of victims and their families each year. Indiana courts should guard the needs of the people they serve. They should seek an active role in solving the problem of rape, both its frequent occurrence and the failure of victims to report the crime. Therefore, Indiana courts must move forward and admit expert testimony on rape trauma syndrome.

COLLEEN ELIZABETH TONN

# Title IX and Its Funding Termination Sanction: Defining the Limits of Federal Power over Educational Institutions

## I. INTRODUCTION

Title IX of the Education Amendments of 1972<sup>1</sup> was designed to “eliminate . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance.”<sup>2</sup> Title IX contains two core provisions: the first containing the general language prohibiting sex discrimination,<sup>3</sup> and the second delineating the possible sanctions for noncompliance with its regulations.<sup>4</sup> Title IX authorizes all federal agencies which provide financial assistance to educational institutions to issue regulations to ensure compliance with the statute’s provisions.<sup>5</sup> Regulations promulgated by the Department of Health, Education and Welfare (HEW)<sup>6</sup> have been the focus of most of the post-enactment legislative and judicial activity regarding Title IX. Federal agencies providing funding to educational institutions are authorized by Title IX to (1) terminate or refuse to grant continued assistance, and (2) utilize any other means authorized by law, including injunctive and declaratory relief, to effect compliance with Title IX provisions by recipients of federal aid.<sup>7</sup>

The United States Supreme Court, in *North Haven Board of Education v. Bell*,<sup>8</sup> drew attention to that portion of the sanction provision

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<sup>1</sup>20 U.S.C. §§ 1681-1686 (1982). Title IX provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” with certain exceptions. These exceptions include, among others, private undergraduate school admissions, 20 U.S.C. § 1681(a)(1); religious schools, 20 U.S.C. § 1681(a)(3); traditionally one-sex schools, 20 U.S.C. § 1681(a)(5); and schools maintaining separate living facilities for men and women, 20 U.S.C. § 1686.

<sup>2</sup>34 C.F.R. § 106.1 (1983).

<sup>3</sup>20 U.S.C. § 1681.

<sup>4</sup>20 U.S.C. § 1682.

<sup>5</sup>*Id.*

<sup>6</sup>The Department of Health, Education, and Welfare’s responsibilities for educational institutions under Title IX were transferred to the Department of Education by the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 677 (1979) (codified at 20 U.S.C. § 3441(a)(3) (1982)). The Department of Health and Welfare was then reorganized as the Department of Health, and Human Services. This Note will refer to the appropriate agency as HEW to avoid confusion. HEW regulations governing Title IX are codified at 34 C.F.R. §§ 106-106.71 (1983).

<sup>7</sup>20 U.S.C. § 1682.

<sup>8</sup>456 U.S. 512 (1982). The Supreme Court held that: (1) employment discrimination comes within Title IX’s prohibition; and, (2) regulations promulgated in connection with Title IX were valid in light of the fact that the agency’s authority under Title IX to promulgate regulations and enforce compliance is subject to a program-specific limitation.

which states that termination of assistance "shall be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found."<sup>9</sup> The Court concluded that a federal agency's authority to promulgate regulations and impose sanctions under Title IX is subject to this "program-specific" limitation.<sup>10</sup> The Court expressly declined the task of defining "program," providing little guidance to subsequent courts charged with interpreting its meaning under Title IX.<sup>11</sup> A review of recent federal court decisions on the subject reveals some fundamental differences in the treatment of such issues as who is a "recipient" of federal financial assistance, and what a "program" entails.<sup>12</sup>

The HEW regulations and their application by that agency have been the subject of great controversy in recent years, and have been challenged under varied circumstances by "recipient" institutions.<sup>13</sup> Two distinct factual settings have prompted recurrent disputes in the federal courts: (1) where an educational institution has received federal funds indirectly through payment of tuition and housing fees by students participating in federally funded aid programs,<sup>14</sup> and (2) where the institution has received federal funds directly, but has not earmarked the funds for the specific discriminatory activity within the institution.<sup>15</sup>

In the first situation, the preliminary issue is whether the institution is actually a "recipient" of federal financial assistance, since any benefits

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<sup>9</sup>20 U.S.C. § 1682.

<sup>10</sup>456 U.S. at 536-37.

<sup>11</sup>*Id.* at 540.

<sup>12</sup>A broader and more flexible reading of the statutory language is found in decisions from the Third and Fifth circuits. *Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549 (5th Cir. 1983), *vacated as moot*, 104 S. Ct. 373 (1984); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *aff'd*, 104 S. Ct. 1211 (1984); *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982). Other circuits have adopted a narrower approach. *E.g.*, *Hillsdale College v. Department of Health, Educ. & Welfare*, 696 F.2d 418 (6th Cir. 1982), *vacated*, 104 S. Ct. 1673 (1984) (for further consideration in light of the Supreme Court's opinion in *Grove City*); *Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 102 S. Ct. 1976 (1982); *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982).

<sup>13</sup>Numerous institutions have challenged HEW's findings that such entities are "recipients" of federal financial assistance when no funding has been received by the institution directly. *See, e.g.*, *Hillsdale College v. Department of Health, Educ. & Welfare*, 696 F.2d 418 (6th Cir. 1982). A second challenge has been based on the contention that the assistance to an institution may not be terminated when only one subpart has been found to employ discriminatory practices. *See, e.g.*, *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

<sup>14</sup>*See, e.g.*, *Hillsdale College v. Department of Health, Educ. & Welfare*, 696 F.2d 418 (6th Cir. 1982) (finding the institution to be a "recipient" but only the loan and grant program to be subject to regulation); *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982) (finding the institution to be a "recipient").

<sup>15</sup>*See, e.g.*, *Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549 (5th Cir. 1983) (terminating funds to university due to honor society's discriminatory practices); *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982) (terminating funds to university due to athletic department's discriminatory practices).

are received indirectly through the students.<sup>16</sup> The second issue is the proper sanction to be applied; HEW's approach has been to seek termination of the students' financial assistance.<sup>17</sup> This Note suggests that this approach is misguided, because it punishes the students rather than the institution fostering the discriminatory activity. This Note further proposes that HEW seek compliance in these cases through injunctive and declaratory actions rather than through the termination sanction, in order to reach the root of the problem without undermining higher education.

In the second situation, where the institution has received direct financial assistance but has not earmarked the funds for the specific discriminatory program or activity, the primary issue is what constitutes a "program"<sup>18</sup> pursuant to the termination sanction. Some courts have supported HEW's "institutional" approach that assistance to the entire institution may be terminated even though the discriminatory activity has been confined to one facet of the institution,<sup>19</sup> such as intercollegiate athletics.<sup>20</sup> Other courts have adhered to a narrower interpretation of "program," a "programmatic" approach which extends termination of assistance only to the particular subpart of the institution in question.<sup>21</sup> This Note supports the broad and flexible interpretation of "program" offered by HEW for strict enforcement of Title IX policies, which prevents institutions from exempting themselves from Title IX coverage by failing to earmark funds for the use of the discriminatory activity.

This Note examines the legislative history of Title IX and recent judicial interpretations of Title IX provisions, specifically regarding what constitutes a "recipient" and a "program" under the statute. This Note derives a logical construction of these provisions and proposes differing applications of Title IX sanctions to the two recurrent factual settings in Title IX cases.

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<sup>16</sup>See cases cited *supra* note 13.

<sup>17</sup>*Id.*

<sup>18</sup>20 U.S.C. § 1682 limits the effect of sanction regulations to "the particular program, or part thereof" in which noncompliance has been found. This language was termed the "program-specific" limitation of Title IX's power by the Supreme Court in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). See *supra* notes 8-10 and accompanying text.

<sup>19</sup>HEW's approach has been referred to as "institutional" because it supports the proposition that an institution's assistance may be terminated upon the finding that it contains a discriminatory subunit. This position has been directly buttressed by *Grove City College v. Bell*, 687 F.2d 684, 700 (3d Cir. 1982) and *Haffer v. Temple Univ.*, 688 F.2d 14, 17 (3d Cir. 1982).

<sup>20</sup>34 C.F.R. § 106.41 (1983). For an incomplete sampling of the debate over athletics, see *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the Comm. on Education and Labor*, 94th Cong., 1st Sess. 46, 71, 123 (1975) [hereinafter cited as *Postsecondary Hearings*]. See also Comment, *HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics*, 6 J.C. & U.L. 345 (1980).

<sup>21</sup>See cases cited *supra* note 12. This position has been termed the "programmatic," approach because it draws a narrow and specific view of "program" which generally does not encompass an entire institution.

## II. TITLE IX LEGISLATION: ITS ORIGIN AND PURPOSE

Title IX grew out of hearings on gender discrimination in education held in 1970 by a special House subcommittee on education.<sup>22</sup> The final version was presented as a floor amendment by Senator Birch Bayh in 1972.<sup>23</sup> Title IX was designed to fill a void left by Title VI of the Civil Rights Act of 1964,<sup>24</sup> which does not address sex discrimination but prohibits discrimination on the basis of race, color, religion, and national origin. Title IX also focuses only on educational programs, while Title VI encompasses all phases of federally funded programs. Summarizing his proposal, Senator Bayh stated:

Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . [T]he heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in Title VI of the 1964 Civil Rights Act.<sup>25</sup>

### A. Title VI as a Guideline

Title IX was explicitly modeled after and contains virtually identical language to certain corresponding sections of Title VI.<sup>26</sup> “[T]he setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI.”<sup>27</sup> Therefore, the legislative history of Title VI is helpful in determining Congress’ intent when it enacted Title IX, even though “[i]t is Congress’ intention in 1972, not in 1964, that is of significance in interpreting Title IX.”<sup>28</sup>

That section of Title VI which authorizes termination of funds only

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<sup>22</sup>*Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970).

<sup>23</sup>118 CONG. REC. 5,802-5,823 (1972) (amendment presented by Senator Bayh).

<sup>24</sup>42 U.S.C. §§ 2000d to 2000d-6 (1982).

<sup>25</sup>118 CONG. REC. 5,803 (1972).

<sup>26</sup>Section 901 and section 902 of Title IX are nearly identical to § 601 and § 602, respectively, of Title VI of the Civil Rights Act of 1964. Compare 20 U.S.C. §§ 1681(a), 1682 (1982) with 42 U.S.C. §§ 2000d, 2000d-1 (1982).

<sup>27</sup>*Postsecondary Hearings*, *supra* note 20, at 170 (comments of Senator Bayh).

<sup>28</sup>*North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529 (1982).

if the federally assisted program engaged in discriminatory activity has been commonly referred to as the “pinpoint” provision.<sup>29</sup> This provision was designed to balance the need to prevent federal financing from being employed to advance discrimination against the fear that the termination sanction would be exercised in a vindictive or capricious manner.<sup>30</sup> Some members of Congress expressed concern, for example, that funding to an entire state might be terminated if only a single school remained segregated, adversely affecting innocent beneficiaries of federal financial assistance.<sup>31</sup> The effort to pinpoint the effect of the termination sanction was developed as an essentially geographic stricture, yet retained a broad applicability to prevent the use of federal monies for the advancement of discrimination.<sup>32</sup>

The “pinpoint” provision and the references to “recipients” of federal financial assistance in Title VI produced interpretive conflicts similar to those later created by the corresponding provisions in Title IX. *Bob Jones University v. Johnson*<sup>33</sup> is often cited as authority for the proposition that an institution is a recipient of federal funds when the student is the actual payee of the federal check. In *Bob Jones*, HEW had ordered that eligible veterans enrolled at Bob Jones University could not receive veterans’ educational benefits because the university engaged in racially discriminatory practices.<sup>34</sup> The university unsuccessfully sought injunctive relief from that order, arguing that since the assistance was paid directly to students, the university was not a recipient of federal financial assistance and therefore was not subject to Title VI.<sup>35</sup> The district court’s rejection of this reasoning was based upon the broad remedial purpose of Title VI and on the fact that the university had actually benefited from federal assistance through payments to the students.<sup>36</sup>

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<sup>29</sup>See *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D. S.C. 1974), *aff’d mem.*, 529 F.2d 514 (4th Cir. 1975).

<sup>30</sup>The Supreme Court, in *Lau v. Nichols*, 414 U.S. 563, 565 (1974), emphasized the importance of preventing federal monies from being put to invidious uses. The fear of vindictive or punitive fund cutoffs, on the other hand, was expressed by Congress prior to enactment of Title VI. *E.g.*, 110 CONG. REC. 7,062 (1964) (comments of Senator Pastore).

<sup>31</sup>See, *e.g.*, 110 CONG. REC. 8,507-08 (1964) (comments of Senator Smathers) (Title VI “would punish a whole area, a whole State, a whole group, because of the sins of one.”).

<sup>32</sup>*Id.* at 11,942.

<sup>33</sup>396 F. Supp. 597 (D. S.C. 1974).

<sup>34</sup>*Id.* at 598-99.

<sup>35</sup>*Id.* at 601-02.

<sup>36</sup>The *Bob Jones* court found that the university benefited in two distinct ways: First, payments to students “releas[ed] institutional funds which would, in the absence of federal assistance, be spent on the student”; and second, the participation of these students who would not have enrolled in the absence of federal aid “enlarg[es] the pool of qualified applicants upon which [the school] can draw for its educational program.” 396 F. Supp.

*Board of Public Instruction v. Finch*<sup>37</sup> addressed the issue whether the federal government, under Title VI, can cut off all federal funds for an institution when only one program within that institution has discriminated. In *Finch*, HEW terminated all funding to a school district which contained eight public schools and received assistance under three federal grant programs.<sup>38</sup> Although the court found that across-the-board termination may be proper in some instances, it required HEW to "make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory."<sup>39</sup> Some commentators have suggested that the *Finch* approach is narrow and unworkable because an institution which does not apportion its funds to specific programs is not subject to termination of assistance under *Finch* unless all programs of the institution are found to be discriminatory.<sup>40</sup> Indeed, some later decisions have found a broader interpretation of "program" under Title VI to be a more efficacious means of eliminating discrimination, by focusing on the nature of the specific activity and the experience of HEW in dealing with it.<sup>41</sup>

Although decisions regarding the scope and limitations of regulatory power under Title VI are by no means dispositive of any Title IX issues, they do provide a broader basis for analysis of legislative intent and judicial policy in Title IX cases.<sup>42</sup> The rationale for a broad reading of Title VI applies equally to Title IX: it achieves the objective of Title IX to prohibit the use of any federal funding to advance sex discrimination in educational institutions.

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at 602-03 (footnotes omitted). The court concluded, "Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in either event." *Id.* at 603.

<sup>37</sup>414 F.2d 1068 (5th Cir. 1969).

<sup>38</sup>*Id.* at 1070-71.

<sup>39</sup>*Id.* at 1079. This approach has been termed the "infection theory." See Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608, 624 (1980).

<sup>40</sup>See Comment, *Board of Public Instruction v. Finch: Unwarranted Compromise of Title VI's termination Sanction*, 118 U. PA. L. REV. 1113, 1115, 1116 (1970) [hereinafter cited as *Finch Comment*]; Note, *Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program,"* 52 IND. L.J. 651, 652 (1977).

<sup>41</sup>E.g., *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (defining "program" broadly enough to encompass an entire state); *Georgia v. Mitchell*, 450 F.2d 1317 (D.C. Cir. 1971) (finding cutoff to entire state appropriate).

<sup>42</sup>But see Note, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L.J. 656, 668-80 (1977) [hereinafter cited as *Private Education Note*] (arguing that Title VI decisions rested upon wholly different constitutional and statutory grounds than did Title IX decisions).

*B. The Purpose and Intent of Title IX*

Title IX was intended to be a powerful weapon with which the federal government could attack discrimination on the basis of sex in educational institutions.<sup>43</sup> Senator Bayh, the author of Title IX:

It is . . . an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.<sup>44</sup>

In order to serve the purpose of Title IX best, the administrative agencies must be able to wield the threat of fund termination in the most effective manner. However, Title IX, like Title VI, was necessarily written in general terms because it applies to a varied group of aid recipients. Therefore, in order to enforce the terms of the statute properly, there must be flexibility in the interpretation of Title IX provisions.

Because Title IX originated as a floor amendment, the preenactment legislative history is sparse, and Senator Bayh's statements made on the day of the amendment are "the only authoritative indications of congressional intent regarding the scope of [Title IX]."<sup>45</sup> Therefore, much of the analysis centers on the statutory language itself and the post-enactment legislative history of Title IX.

The two core provisions of Title IX are at the center of the controversy concerning the reach of the statutory language. Section 901(a) of Title IX provides that "[n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."<sup>46</sup> Numerous institutions have resisted regulation under Title IX on the grounds that they do not "receive" federal financial assistance in any direct sense, and therefore do not come within the prohibitory language of section 901.<sup>47</sup>

Congress has given federal agencies the power to enforce this prohibition by authorizing regulations which may include provisions for termination of financial assistance or for enforcement "by any other means authorized by law."<sup>48</sup> The pivotal language of section 902 of Title IX, which contains this authorization, states that the effect of the termination sanction must be limited to the "particular program, or part

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<sup>43</sup>See *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1978); 118 CONG. REC. 5,807-08 (1972).

<sup>44</sup>118 CONG. REC. 5,808 (remarks of Senator Bayh).

<sup>45</sup>*North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982).

<sup>46</sup>20 U.S.C. § 1681 (1982). See *supra* note 1.

<sup>47</sup>See *supra* note 13.

<sup>48</sup>20 U.S.C. § 1682.

thereof" in which the noncompliance has been found.<sup>49</sup> Because of the general nature of the statutory language, interpretations of "program" have ranged from the specific federal grant program, through which a university received funds<sup>50</sup> to an entire university.<sup>51</sup> The Supreme Court directed its attention to this language in *North Haven Board of Education v. Bell*.<sup>52</sup>

### III. *North Haven*—THE SUPREME COURT'S ADOPTION OF THE "PROGRAM-SPECIFIC" LIMITATION

In *North Haven*, the petitioners were two federally funded public school boards threatened with enforcement proceedings for violation of section 901 of Title IX with respect to employment practices. They brought separate actions seeking declaratory and injunctive relief on the ground that section 901 was not intended to apply to employment practices.<sup>53</sup> The district court in each case granted a motion for summary judgment for the school board.<sup>54</sup> The Second Circuit Court of Appeals reversed in a consolidated appeal.<sup>55</sup> The court of appeals held that section 901 was intended to prohibit employment discrimination and that HEW's corresponding Subpart E regulations were consistent with section 902 of Title IX.<sup>56</sup>

On writ of certiorari, the Supreme Court affirmed the decision of the court of appeals. The Court found specifically that (1) employment discrimination in educational institutions comes within the ambit of Title IX's prohibition, and (2) the Subpart E regulations promulgated by HEW prohibiting employment discrimination in educational institutions in connection with Title IX are valid.<sup>57</sup> While Title IX's coverage of discrim-

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<sup>49</sup>20 U.S.C. § 1682 provides:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, [t]hat . . . compliance cannot be secured by voluntary means.

<sup>50</sup>*E.g.*, *Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981).

<sup>51</sup>*E.g.*, *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982).

<sup>52</sup>*North Haven*, 456 U.S. 512, was the first case in which the Supreme Court addressed the scope of Title IX since it initially recognized a personal right of action under Title IX in *Cannon v. University of Chicago*, 441 U.S. 677 (1978).

<sup>53</sup>456 U.S. at 517.

<sup>54</sup>*Id.* at 518.

<sup>55</sup>*Id.* at 519; see *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773 (2d Cir. 1980).

<sup>56</sup>629 F.2d at 778.

<sup>57</sup>456 U.S. at 530, 539.

inatory practices in employment is not directly within the subject matter of this Note, the Court's reasoning supporting its conclusion in favor of the validity of the HEW regulations deserves some attention. Pointing to the "program-specific" nature of Title IX, the Court found that the authority of federal agencies to promulgate regulations under section 902 is also limited by a "program-specific" restriction.<sup>58</sup>

The Court began with the statutory language of Title IX, noting that both sections 901 and 902 limit Title IX's coverage to those educational programs or activities receiving federal financial assistance.<sup>59</sup> The Court reasoned that regulations promulgated by agencies such as HEW may not be broader than the area encompassed by the "program-specific" limitation itself.<sup>60</sup> The Court relied on that portion of section 902 which states that agencies are "'authorized and directed to effectuate the provisions of section 901 *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute.'"<sup>61</sup> Second, the Court found that the legislative history of Title IX "corroborates" its program-specific nature.<sup>62</sup> The Court pointed out that Congress failed to adopt several proposed amendments to Title IX which would have enlarged its scope to proscribe all discriminatory practices of an institution rather than merely sex discrimination, or that would not have limited the sanctions to programs receiving federal financial assistance.<sup>63</sup> The Court thus construed the term "program" broadly when it recognized this "program-specific" limitation.

Finally, the Court acknowledged that judicial interpretation of the corresponding sections of Title VI legislation had been "program-specific," citing *Board of Public Instruction v. Finch*.<sup>64</sup> The court in *Finch* required, prior to a cut off of funding, specific findings of fact indicating that a particular program was either administered in a discriminatory manner, or was so affected by discriminatory practices that it thereby became discriminatory.<sup>65</sup> The Supreme Court's general reference to *Finch*, however, indicates that its reliance on that decision was limited to a recognition that both Title VI and Title IX fit the Court's broad notion of program-specificity. The Court did not implicitly or expressly endorse the rationale of the *Finch* decision.

The Court offered negligible guidance as to the scope of the term "program" in its "program-specific" limitation. "[W]hether termination

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<sup>58</sup>*Id.* at 536-37 (addressing the language of § 902 which limits the sanction effects to the discriminatory "program or part thereof" as a "program-specific" limitation).

<sup>59</sup>*Id.* at 537.

<sup>60</sup>*Id.* at 536-37.

<sup>61</sup>*Id.* at 537 (citing 20 U.S.C. § 1682) (emphasis by the Court).

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 537-38.

<sup>64</sup>414 F.2d 1068 (5th Cir. 1969).

<sup>65</sup>*Id.* at 1079. See *supra* notes 37-40 and accompanying text.

of petitioners' federal funds is permissible under Title IX is a question that must be answered by the District Court in the first instance. Similarly, we do not undertake to define 'program' in this opinion."<sup>66</sup> It is significant that, at the time of the Court's refusal to indicate the breadth of Title IX sanction powers, several of the disputes leading to diametric interpretations of the sanction provision by federal courts had already erupted.<sup>67</sup> The referral to the task of defining the extent of the "program" in *North Haven* to the district court indicates that the Court recognized that Title IX provisions should be interpreted with flexibility, depending upon the circumstances of each case.

At first glance, it appears anomalous that the focus of *North Haven* was a broad expansion of Title IX regulatory powers to the employment sector of the educational institutions,<sup>68</sup> while adoption of the accompanying regulations was restricted by the caveat that all such regulations be applied in a "program-specific" manner.<sup>69</sup> However, the broad manner in which the Court addressed the limitation merely reinforced the principle that Title IX provisions may not be applied to entities outside the reach of federal monies. Addressing the extent of Title IX coverage, the Court stated, "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'"<sup>70</sup> The Court also followed the principle that an agency's statutory construction is presumed to have accurately discerned the legislative intent when it has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation."<sup>71</sup> Therefore, HEW's construction of Title IX must be accorded the deference it is due. The principles fostered by the *North Haven* decision, that Title IX provisions have a far-reaching effect and that the courts should defer to HEW's construction of Title IX legislation, provide valuable guidance in analyzing who is a "recipient" of federal funding under the statute, and to what "programs" the Title IX sanctions apply.

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<sup>66</sup>456 U.S. at 539-40.

<sup>67</sup>*E.g.*, *Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981) (addressing the dispute whether an educational institution is an educational program); *Romeo Community Schools v. Department of Health, Educ. and Welfare*, 600 F.2d 581 (6th Cir. 1979) (acknowledging the debate concerning whether Title IX applies to employees of educational institutions as well as to students); *Bennett v. West Texas State University*, 525 F. Supp. 77 (N.D. Tex. 1981), *rev'd*, 698 F.2d 1215 (1983) (discussing the issue whether indirect federal financial aid brings a program within the ambit of Title IX).

<sup>68</sup>The depth of the Court's analysis of prior and post-enactment legislative history indicates the Court's expansive attitude in extending Title IX's control to the employment sector.

<sup>69</sup>456 U.S. at 536-37.

<sup>70</sup>*Id.* at 521 (citing cases advocating principles of broad statutory interpretation).

<sup>71</sup>*Id.* at 535 (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979), quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940)).

IV. *Grove City*: A STEP BACKWARD

In its recent decision in *Grove City College v. Bell*,<sup>72</sup> the Supreme Court dealt a crippling blow to the enforcement of Title IX as it originally was intended. A majority of the Court upheld the findings of the court of appeals that (1) "recipients" of federal funds under Title IX include those institutions which receive funding indirectly through tuition payments by student participants in federal grant and aid programs,<sup>73</sup> and (2) failure by such institutions to comply with requests for assurances of compliance under the statute warrants termination of funding to that institution or program.<sup>74</sup> The troubling portion of the decision, however, is Part III, in which a plurality of the Court concluded that

the receipt of BEOGs [Basic Educational Opportunity Grants] by some of Grove City's students does not trigger institution-wide coverage under Title IX. In purpose and effect, BEOGs represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX.<sup>75</sup>

The remaining Justices criticized this element of the decision as an unnecessary "advisory opinion"<sup>76</sup> and as an interpretation of the statutory language which ignores the primary purposes for which Title IX was enacted.<sup>77</sup> Indeed, the Court's narrow interpretation provides an unnecessary restraint on the strength of Title IX sanctions.

The controversy over the status of Grove City College as a "recipient" of federal funding arose when HEW attempted to secure a Title IX Assurance of Compliance from the college.<sup>78</sup> Grove City College received no direct funding from the federal government,<sup>79</sup> but its students did receive aid under the Basic Education Opportunity Grant (BEOG)<sup>80</sup>

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<sup>72</sup>104 S. Ct. 1211 (1984).

<sup>73</sup>*Id.* at 1219-20.

<sup>74</sup>*Id.* at 1222.

<sup>75</sup>*Id.*.

<sup>76</sup>*Id.* at 1225 (Stevens, J., concurring).

<sup>77</sup>*Id.* at 1226 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

<sup>78</sup>The Assurance of Compliance provides that the recipient "will comply with . . . Title IX . . . which prohibits discrimination on the basis of sex in education programs and activities receiving federal financial assistance." 687 F.2d 684, 688 n.5 (3d Cir. 1982).

<sup>79</sup>687 F.2d at 689. In its brief at the appellate level, Grove City explained its policy in refusing federal funds: "Since its founding in 1876, the College, as an integral part of its philosophy, steadfastly refused any forms of government funding . . . since to do so would compromise its independence." *Id.* at n. 7.

<sup>80</sup>*Id.* at 688. One hundred forty of Grove City's students were eligible to receive BEOG's, out of a total enrollment of 2,200. *Id.* There are two methods of disbursement of BEOG's. Under the Regular Disbursement System, the institution serves as a conduit of funding between the federal agency and the students. 34 C.F.R. §§ 690.71, 690.78 (1983). Under the Alternate Disbursement System, funds are disbursed directly to the students. 34 C.F.R. § 690.92 (1983).

and Guaranteed Student Loan (GSL)<sup>81</sup> programs sponsored by HEW. When Grove City refused to execute an Assurance of Compliance, HEW initiated administrative proceedings to terminate grants and loans to students attending the college. An order was entered prohibiting the payment of federal funds to students of Grove City, and the college sought a declaration that the termination order was void.<sup>82</sup> The district court held for Grove City, basing its decision upon the alternate grounds that (1) HEW's regulations proscribing discrimination in employment by educational institutions pursuant to Title IX were invalid,<sup>83</sup> and (2) a termination of federal financial assistance is authorized only upon an express finding of discrimination, which was absent in *Grove City*.<sup>84</sup>

The Court of Appeals for the Third Circuit reversed, finding that Grove City was a "recipient" under Title IX and thus was required to file an Assurance of Compliance form.<sup>85</sup> The court relied upon the legislative history of the statute and comparisons with Title VI<sup>86</sup> to support its determination that federal financial assistance paid to students, who in turn use the funds to pay for their education, "constitute[s] no less a part of a college's revenues than federal monies paid directly to the institution itself."<sup>87</sup> Based on this determination, the court found that HEW had acted within its authority when it defined "recipient" in its regulations to include any institution which receives federal financial assistance "through another recipient."<sup>88</sup> Grove City, therefore, became a "recipient" pursuant to HEW regulations when it received or benefited from federal funds that had been granted to its students for their use in educational endeavors.

The court of appeals also concluded that funds may be terminated for failure to file an Assurance of Compliance when required, even in the absence of an express finding of discrimination.<sup>89</sup> The court noted that section 902 of Title IX expressly authorizes HEW to terminate federal financial assistance "in order to secure compliance with any regulatory requirement designed to effectuate the objectives of Title IX."<sup>90</sup>

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<sup>81</sup>687 F.2d at 688. Three hundred forty-two of Grove City's students had obtained GSL's. *Id.* Under the Guaranteed Student Loan Program, private lending institutions lend funds directly to the students, with interest paid by the federal government. *See generally*, 34 C.F.R. § 682.100 (1983).

<sup>82</sup>687 F.2d at 689.

<sup>83</sup>*Id.* at 690. Note that *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), expressly endorsed the validity of the regulations governing employment in light of the program-specific limitation. *See supra* note 8.

<sup>84</sup>687 F.2d at 690.

<sup>85</sup>*Id.* at 693.

<sup>86</sup>*Id.* at 691-96.

<sup>87</sup>*Id.* at 693.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at 703.

<sup>90</sup>*Id.*

A majority of the Supreme Court affirmed, finding that indirect receipt of federal funding triggers Title IX coverage,<sup>91</sup> and that a refusal to execute an Assurance of Compliance warrants termination of federal assistance.<sup>92</sup> Unfortunately, the Court did not stop at that point, but went on to analyze the "program-specific" nature of Title IX. The Court concluded that the receipt of federal loans and grants by a college's students does not invoke institution-wide coverage under Title IX.<sup>93</sup> Thus, the *only* unit of Grove City College forced to comply with non-discrimination standards after this decision was the student financial aid department of the school. As suggested by the Justices' separate opinions, the Court decided an issue which was not in dispute;<sup>94</sup> the controverted issue was whether Grove City College could be required to execute an Assurance of Compliance with Title IX, a form which merely certifies that the college complies with Title IX "to the extent applicable to it."<sup>95</sup> Moreover, the Court ignored the broad remedial purpose of Title IX in its analysis, and apparently endorsed a narrow interpretation of "program" which directly contravenes Congress' intent in enacting Title IX.<sup>96</sup>

The next two sections of this Note analyze the definition of "recipient" of federal funding under Title IX, and the definition of "program" to which the statutory sanctions for noncompliance apply. Each section concludes with a discussion of the effect of the Supreme Court's *Grove City* decision on the interpretation of such statutory language.

#### V. THE INITIAL QUESTION—WHAT CONSTITUTES A "RECIPIENT" OF FEDERAL FINANCIAL ASSISTANCE?

Only recipients of federal financial assistance are required to comply with the provisions and regulations of Title IX.<sup>97</sup> The regulations define "recipient" as any organization, entity, or person "to whom federal financial assistance is extended *directly or through another recipient* and which operates an education program or activity which receives or benefits from such assistance."<sup>98</sup> Federal assistance to education includes direct

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<sup>91</sup>104 S. Ct. at 1220.

<sup>92</sup>*Id.* at 1222.

<sup>93</sup>*Id.*

<sup>94</sup>*Id.* at 1225, 1227 n.1 (Stevens, J., concurring; Brennan and Marshall, JJ., concurring in part and dissenting in part).

<sup>95</sup>*Id.* at 1215; *see supra* note 78.

<sup>96</sup>104 S. Ct. at 1227 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

<sup>97</sup>*See* 20 U.S.C. § 1681 (1982).

<sup>98</sup>34 C.F.R. § 106.2(h) (1983) (emphasis added). The complete definition of "recipient," as promulgated by HEW, reads as follows:

[A]ny State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance

grants to universities and to students in the form of scholarships, loans, or funds made available for the purchase or renovation of real or personal property; services provided by federal personnel; and a variety of other contracts, agreements, or arrangements designed to assist the education program or activity.<sup>99</sup> Courts and commentators have offered many different answers to the question of what constitutes a "recipient." This section examines the legislative history and courts' differing constructions of "recipient," and concludes with an analysis of the Supreme Court's construction of the term in *Grove City*.

### A. Legislative History of "Recipient"

The legislative history of Title IX reflects the clear intention that indirect aid to an institution is sufficient to bring that entity within the ambit of Title IX. In the 1971 debates regarding the proposed education amendments of which Title IX was a part, Senator Bayh referred to the BEOG program,<sup>100</sup> by which educational institutions benefit indirectly through the students' payment of tuition, housing, and other fees, when he stated, "It does not do any good to pass out hundreds of millions of dollars if we do not see that the money is applied equitably to over half our citizens."<sup>101</sup> Senator McGovern, urging the passage of the Title IX amendment, recognized its assurance that no funds whatsoever would be extended to institutions fostering discriminatory practices.<sup>102</sup>

The postenactment legislative history of Title IX supports the conclusion that indirect aid constitutes "federal financial assistance." In response to HEW's interpretation of the statute, Senators Helms and McClure proposed resolutions that would have limited Title IX's reach to those funds received directly by the educational institution.<sup>103</sup> Congress, however, declined to pass these amendments, even though other portions of the statute were being amended at the time of the proposed resolutions.<sup>104</sup> Senator McClure's attempt to alter the indirect aid coverage of Title IX met with substantial resistance, typified by Senator Pell's remarks: "While these dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not

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is extended *directly or through another recipient* and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

*Id.* (emphasis added).

<sup>99</sup>34 C.F.R. § 106.2(g) (1983).

<sup>100</sup>*See supra* note 80.

<sup>101</sup>117 CONG. REC. 30,412 (1971). The same sentiments were expressed in the House. 117 CONG. REC. 39,252 (1971).

<sup>102</sup>117 CONG. REC. 30,158-59 (1971).

<sup>103</sup>*See* 121 CONG. REC. 23,845-47 (1975); 122 CONG. REC. 28,144-47 (1976).

<sup>104</sup>*See* *Grove City College v. Bell*, 687 F.2d 684, 694 (3d Cir. 1982) (recognizing that Congress had not hesitated to amend Title IX when it did not agree with HEW interpretations).

believe we should take the position that these Federal funds can be used for further discrimination based on sex.”<sup>105</sup> These comments were echoed by Senator Bayh, who emphasized that if the student benefits by federal aid, the school likewise benefits. The proposed amendment was defeated by a substantial margin.<sup>106</sup>

The legislative history thus reflects Congress’ intent that the term “recipient” under Title IX is to be construed broadly. A broad construction of “recipient” is consonant with the objective of Title IX to prohibit the use of any federal financial assistance, either direct or indirect, to promote discrimination.

### B. Judicial Construction of “Recipient”

The decision of the court of appeals in *Grove City*<sup>107</sup> supports HEW’s approach<sup>108</sup> that a “recipient” is an entity which receives or benefits from federal financial assistance by either direct or indirect means. The court held that “[it is] clear that Congress’ overriding objective in enacting Title IX, that is, to withhold public funds from an institution which engages in sex discrimination, was to deny to discriminating institutions all such financial support, *direct or otherwise*.”<sup>109</sup>

The appellate court’s analysis of “recipient” in *Grove City* was patterned after the *Bob Jones* decision under Title VI, the “parent” statute of Title IX.<sup>110</sup> The *Bob Jones* court found that a university benefits in at least two ways from federal aid to students. First, payments to students release funds of the institution which would otherwise be expended on the students.<sup>111</sup> Second, the participation of students who would not enroll in the educational programs in the absence of federal financial assistance “enlarge[s] the pool of qualified applicants upon which [the school] can draw for its educational program.”<sup>112</sup> The *Grove City* appellate court pointed out that legislative references to *Bob Jones* subsequent to Title IX’s enactment buttressed its reliance upon the *Bob Jones* interpretation of “recipient.”<sup>113</sup>

Other courts have held, albeit reluctantly, that institutions in situations similar to that of Grove City College are “recipients” under Title IX, but have refused to subject the institutions as a whole to Title IX

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<sup>105</sup>122 CONG. REC. 28,145 (1976) (remarks of Senator Pell).

<sup>106</sup>*Id.* at 28,148 (proposed amendment defeated by a 50 to 30 vote).

<sup>107</sup>687 F.2d 684 (3d Cir. 1982).

<sup>108</sup>*See supra* note 98 and accompanying text.

<sup>109</sup>687 F.2d at 693 (emphasis added) (relying on the 1971 debates over the original Title IX amendment proposed by Senator Bayh).

<sup>110</sup>*Id.* at 695 (“A case under Title VI which supports our conclusion that Grove is a recipient . . . is *Bob Jones University*.”).

<sup>111</sup>*Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602 (D. S.C. 1974).

<sup>112</sup>*Id.* at 603 (footnote omitted).

<sup>113</sup>687 F.2d at 696 (citing Senator Bayh’s comment at 122 CONG. REC. 28,145 (1976)).

regulatory power.<sup>114</sup> These courts have reasoned that regulations which purport to subject entire institutions to the strictures of Title IX exceed the statutory authority granted HEW by Congress.<sup>115</sup> In *Hillsdale College v. Department of Health, Education and Welfare*,<sup>116</sup> the college had never received any federal financial assistance, but several of its students did receive aid under various federal programs,<sup>117</sup> including the BEOG<sup>118</sup> and GSL<sup>119</sup> programs. Federal financial aid to Hillsdale's students was terminated after the college failed to execute an Assurance of Compliance. Hillsdale sought review of the order terminating the aid. The court found, in part, that Hillsdale College was a "recipient" of the aid to its students, but that only the student loan and grant program within the college was subject to Title IX regulation.<sup>120</sup> The court concluded that the regulation which required the institution to execute an Assurance of Compliance as a condition to receipt of student loans was invalid, because it was being applied by HEW to an entire college.<sup>121</sup>

Although the *Hillsdale* court vigorously refuted that Title IX regulations apply to an entire institution, it conceded that an express finding of discrimination by an educational institution or its subparts is not a prerequisite to a termination of funding to that institution.<sup>122</sup> HEW has express authority, through section 902 of Title IX, to terminate assistance in order to secure compliance with any regulatory requirement designed to effectuate the objectives of Title IX.<sup>123</sup> The completion of an annual Assurance of Compliance form falls squarely within the meaning of that portion of Title IX. Therefore, recipients of federal aid may be required to comply with investigative regulations like the Assurance of Compliance requirement independent of their susceptibility to penalties for noncompliance with Title IX's central prohibition of sex discrimination.

Both the legislative history and relevant case law have thus applied

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<sup>114</sup>See *Hillsdale College v. Department of Health, Educ. & Welfare*, 696 F.2d 418 (6th Cir. 1982); *Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981).

<sup>115</sup>E.g., *Hillsdale College v. Department of Health, Educ. & Welfare*, 696 F.2d 418, 424 (6th Cir. 1982).

<sup>116</sup>696 F.2d 418 (6th Cir. 1982). This decision was vacated, 104 S. Ct. 1673 (1984), for further consideration in light of the Supreme Court's opinion in *Grove City*. However, the *Hillsdale* court's interpretation of "recipient" is consistent with that of the Supreme Court. See *supra* note 73 and accompanying text. Accordingly, *Hillsdale* is discussed in this Note as an example of a judicial approach to the definition of "recipient."

<sup>117</sup>Hillsdale College students secured loans or grants under the National Direct Student Loan (NDSL) Program and the Supplementary Educational Opportunity Grants (SEOG) Program, in addition to the BEOG and GSL Programs. 696 F.2d at 420.

<sup>118</sup>See *supra* note 80.

<sup>119</sup>See *supra* note 81.

<sup>120</sup>696 F.2d at 430. The Supreme Court reached a similar conclusion in *Grove City*. See *supra* note 75 and accompanying text.

<sup>121</sup>696 F.2d at 430.

<sup>122</sup>*Id.*

<sup>123</sup>20 U.S.C. § 1682.

a broad construction of the term “recipient” in order to prohibit the use of any federal aid to promote discriminatory practices. The Supreme Court upheld this broad reading of “recipient” in *Grove City College v. Bell*.

C. *Grove City: The Supreme Court Recognizes The “Indirect Recipient”*

A majority of the Supreme Court, in Part II of its *Grove City* opinion, provided a well-reasoned analysis of the meaning of “recipient” under Title IX,<sup>124</sup> and had “little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to . . . students rather than directly to one of the College’s educational programs.”<sup>125</sup>

The Court began by addressing the structure and language of the Education Amendments of 1972,<sup>126</sup> in which Congress both created the BEOG program and invoked the nondiscrimination requirements of Title IX. Based on the connection between Title IX and the BEOG program, and based on Congress’ express concern with potential discrimination in the administration of student financial aid programs, the Court stated that “it would indeed be anomalous to discover that one of the primary components of Congress’ comprehensive ‘package of federal aid’ . . . was not intended to trigger coverage under Title IX.”<sup>127</sup> The Court pointed out that nothing in section 901 indicates that Congress intended to condition its proscription of sex discrimination upon the manner in which the program or activity receives federal assistance.<sup>128</sup> The Court endorsed the finding of the court of appeals that Title IX encompasses all forms of federal assistance, whether direct or indirect, and reiterated the need expressed in *North Haven* to “accord Title IX a sweep as broad as its language.”<sup>129</sup>

In further support of its conclusion that federal aid to institutions through their students or by other indirect means places the institutions within the ambit of Title IX coverage, the Court cited several statements made by congressmen contemporaneously with the enactment of Title IX; these statements reflected a legislative awareness that student assistance programs created by the Education Amendments of 1972 would provide significant economic aid to colleges and universities.<sup>130</sup> Additionally, the Court recognized, in its analysis of Title IX’s postenactment legislative history, that Congress had had several opportunities to amend

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<sup>124</sup>104 S. Ct. at 1216-20.

<sup>125</sup>*Id.* at 1220.

<sup>126</sup>*Id.* at 1216-17.

<sup>127</sup>*Id.* at 1217.

<sup>128</sup>*Id.*

<sup>129</sup>*Id.* (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

<sup>130</sup>*Id.* at 1218-19.

the statute to refute HEW's broad approach to Title IX coverage in its regulations, but had failed to do so, even though other portions of the statute were amended.<sup>131</sup>

Once it is determined that a particular institution is a recipient of federal financial assistance through either direct or indirect benefits, the means of implementation and enforcement of Title IX's prohibition should logically be as broad as the legitimate end which Title IX serves. However, the scope of the power to sanction noncomplying programs has been the subject of such extensive criticism that its effect has been unnecessarily restricted, largely due to the conflicting interpretations of the term "program."

#### VI. DEFINING "PROGRAM": SAFEGUARD OR UNWARRANTED DEFENSE?

Recipients of federal assistance face the ultimate sanction for violation of Title IX provisions, termination of federal funding. However, the statute limits the cutoff of federal assistance to the particular "program, or part thereof" in which noncompliance is found.<sup>132</sup>

This "program-specific" limitation has been applied to recipient institutions in markedly different ways. HEW's approach has been termed "institutional" since it supports the position that an entire institution may constitute the "program" for purposes of Title IX.<sup>133</sup> While some courts advocate the HEW approach,<sup>134</sup> others adhere to the opposite view, sometimes referred to as a "programmatic" approach,<sup>135</sup> only refers to the specific subpart in which discrimination has been positively identified. This section examines the disparate interpretations of "program" in light of the legislative history of Title IX, and discusses the impact of the Supreme Court's overly restrictive and controversial construction of the statutory language.

##### A. *The Legislative History of "Program, or Part Thereof"*

Legal commentators and a handful of federal courts faced with the task of defining the parameters of "program" have recognized that "neither the statutes, by their terms, nor the legislative history resolve the question of what constitutes the 'program.'"<sup>136</sup> Sparse as it may be,

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<sup>131</sup>*Id.* at 1219.

<sup>132</sup>20 U.S.C. § 1682.

<sup>133</sup>See *supra* note 19 and accompanying text. It should be noted, however, that in its briefs filed in *Grove City*, HEW inexplicably changed its position to support the Supreme Court's narrow interpretation of "program." 104 S. Ct. at 1216 n.10. As Justice Brennan pointed out, this shift in policy lessens the deference that may be accorded HEW's interpretation. 104 S. Ct. at 1237 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

<sup>134</sup>See *supra* note 19 and accompanying text.

<sup>135</sup>See *supra* note 21 and accompanying text.

<sup>136</sup>See, e.g., *Finch Comment*, *supra* note 40, at 1116; Todd, *Title IX of the 1972*

the concurrent and post-enactment legislative history is worthy of some attention.

It has been noted previously that Title IX found its origin in Title VI and is to be interpreted in a similar manner.<sup>137</sup> The so-called “pinpoint” provision of Title VI<sup>138</sup> was incorporated as a last-minute response to the fears that an unlimited funding cutoff provision might foster vindictive or capricious exercises of its power over programs unrelated to, and not identified with, the discriminatory activity.<sup>139</sup>

This limitation was apparently included in Title VI with the intent that it would provide a primarily geographic stricture on the funding termination sanction.<sup>140</sup> The inclusion of the “pinpoint” provision dispelled the fears of several congressmen that an entire state could be subjected to the cutoff of federal financial assistance as a result of discrimination by one program within the state.<sup>141</sup> Significantly, Congress did not express any reservations that federal funding to an institution should not be terminated when that institution contains only one discriminatory subpart or program rather than an institution-wide discriminatory policy. The framers of Title VI, therefore, apparently intended to limit the reach of its regulatory control only to the extent necessary to prevent harm to entities which are separate from and unrelated to the discriminatory “program.”

The post-enactment history of Title IX parallels this reasoning. During congressional review of HEW regulations, the controversy centered on the relation of Title IX to intercollegiate athletics.<sup>142</sup> Several unsuccessful attempts were made to exempt such athletic programs from the Act’s coverage.<sup>143</sup> Senator Bayh, testifying before the House Committee reviewing the regulations, declared:

[A]lthough federal money does not go directly to the football programs, federal aid to any of the school system’s programs frees other money for use in athletics. . . . Without federal aid a school would have to reduce program offerings or use its resources more efficiently. . . . If federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it.<sup>144</sup>

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*Education Amendments: Preventing Sex Discrimination In Public Schools*, 53 TEX. L. REV. 103, 107-13 (1974).

<sup>137</sup>See *supra* notes 26-27 and accompanying text.

<sup>138</sup>See *supra* notes 29-32 and accompanying text.

<sup>139</sup>See 110 CONG. REC. 7,067 (1964) (remarks of Senator Ribicoff); *accord*, 110 CONG. REC. 11,942 (1964) (remarks of Attorney General Kennedy); 110 CONG. REC. 7,059 (1964) (remarks of Senator Pastore); *Finch Comment*, *supra* note 40, at 1116-24 (1970).

<sup>140</sup>See *Iron Arrow Honor Soc’y v. Heckler*, 702 F.2d 549, 557 (5th Cir. 1983).

<sup>141</sup>*Id.*

<sup>142</sup>*Postsecondary Hearings*, *supra* note 20, at 46, 66, 98, 304 (1975).

<sup>143</sup>*Id.*

<sup>144</sup>*Id.* at 171.

These excerpts reflect the view of Congress that programs receiving nonearmarked funding through an institution benefited from the general financial assistance received by the entire institution and are subject to Title IX regulation. Since the benefits these programs receive cannot be separated from the general flow of aid to the institution for sanction purposes, the logical and most efficacious means to force compliance with Title IX is to eliminate the source of aid, the financial assistance to the institution itself. If the source of aid is not eliminated, the institution is permitted to contravene the underlying policy of Title IX by using federal assistance to advance discriminatory practices, while asserting the program-specific nature of the statutory language as an unwarranted defense to the sanction powers of Title IX.<sup>145</sup>

Two conclusions may be drawn from the legislative history of Title IX: (1) the precise definition and parameters of "program" have never been established, and (2) Congress never intended the statutory language to be interpreted in so narrow and restrictive a manner as to curtail the effectiveness of Title IX sanctions.

### B. Judicial Construction of "Program, or Part Thereof"

The courts have been divided over the breadth to afford the sanction powers of Title IX. While some courts have subscribed to the broad or "institutional"<sup>146</sup> approach espoused by HEW, others have adhered to the narrow or "programmatic" approach.<sup>147</sup> The former approach comports more closely with the legislative intent of Title IX and closes loopholes in the effectiveness of Title IX which may occur when the "programmatic" approach is taken.

1. *Institutional Approach*.—The principal cases upholding a broad reading of "program" are the decisions of the Third Circuit Court of Appeals in *Grove City College v. Bell*,<sup>148</sup> and *Haffer v. Temple University*.<sup>149</sup> In *Grove City*, the appellate court examined the legislative history of Title IX, and found that "the legislators did not contemplate that separate, discrete, and distinct components or functions of an integrated educational institution would be regarded as the individual programs."<sup>150</sup> The court reasoned that the proscriptive force of the statute should not be rendered impotent by an overly technical reading of Title IX's language simply because indirect or nonearmarked funding is in-

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<sup>145</sup>A similar argument was presented by the American Association of University Women (AAUW) in its supplemental letter memorandum to the appellate court in *Grove City College v. Bell*, 687 F.2d 684, 698 (3d Cir. 1982).

<sup>146</sup>See *supra* note 19. The "institutional" terminology originated with references to the position taken by the court in *Bob Jones* under Title VI. See *supra* note 36.

<sup>147</sup>See *supra* note 12.

<sup>148</sup>See *supra* notes 78-90 and accompanying text.

<sup>149</sup>688 F.2d 14 (3d Cir. 1982).

<sup>150</sup>*Grove City College v. Bell*, 687 F.2d. 684, 697 (3d Cir. 1982).

volved.<sup>151</sup> A narrow reading of “program” in cases involving non-earmarked funding would render Title IX ineffective:

“[A]n institution whose entire purpose is educational [would be] exempt from coverage when it is financed with federal funds that can be used for virtually any educational purpose instead of a clearly limited function. The absurd result if this approach is followed to its logical conclusion is that general higher education aid would never bring the college under Title IX coverage because no specific program within the College would be earmarked to benefit from the federal funding.”<sup>152</sup>

The appellate court concluded that the “remedy to be ordered for failure to comply with Title IX is as extensive as the program benefitted”; and that where indirect or nonearmarked funding is provided to an institution, the institution itself constitutes the “program.”<sup>153</sup>

In *Haffer*, as in *Grove City*, the university received a substantial amount of nonearmarked federal funding.<sup>154</sup> The *Haffer* court was presented not with a failure to execute an Assurance of Compliance, but with an allegation of discrimination.<sup>155</sup> The Temple University athletic department was alleged to have fostered discriminatory practices, and was found to be a “recipient” of aid because federal money sent to the university freed nonfederal funds which were then allocated to the athletic department.<sup>156</sup> The *Haffer* court, relying on an analysis similar to that in *Grove City*, held that where the federal government furnishes nonearmarked aid to an institution, the institution itself is the “program” pursuant to Title IX.<sup>157</sup>

In *Iron Arrow Honor Society v. Heckler*,<sup>158</sup> the court authorized the termination of funding to the University of Miami in Florida because of the discriminatory nature of one of its honor societies, but relied upon a different rationale from that of the *Grove City* and *Haffer* decisions. The court analogized the effect of the honor society’s male-only policy to the pervasive nature of a discriminatory admissions policy, finding that such practices “subtly [sic] undermine the self-worth of

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<sup>151</sup>*Id.* at 698.

<sup>152</sup>*Id.* (citing AAUW memo; see *supra* note 145).

<sup>153</sup>*Id.* at 700.

<sup>154</sup>*Haffer v. Temple Univ.*, 688 F.2d 14, 15-16 (3d Cir. 1982). Temple University received substantial sums of federal monies on a direct and indirect basis, yet the school did not earmark those funds for its allegedly discriminatory athletic department. *Id.*

<sup>155</sup>*Id.* at 15.

<sup>156</sup>*Id.* at 17.

<sup>157</sup>*Id.*

<sup>158</sup>702 F.2d 549 (5th Cir. 1983). *Iron Arrow* was vacated as moot, 104 S. Ct. 373 (1984). The university had issued a policy statement that it would not permit Iron Arrow to resume its discriminatory practices on campus even if the honor society succeeded in its lawsuit. 702 F.2d at 552. Nonetheless, the *Iron Arrow* decision merits discussion; it presents an analysis distinct from the “institutional” or “programmatic” approaches. See *infra* notes 159-62 and accompanying text.

women who participate in these programs.”<sup>159</sup> The court distinguished those cases which have taken a “programmatically” approach on the grounds that such decisions did not address an institution’s “pervasive practices that go beyond discrete academic or non-academic programs.”<sup>160</sup> Expressly denying any reliance on a “benefit” or “freeing up of funds” theory, or on any “institution as program” theory,<sup>161</sup> the *Iron Arrow* court concluded that because of the society’s close historical ties with the university, the discriminatory practices of the society were attributable to the university itself.<sup>162</sup> At first glance, one might conclude that the court’s primary criterion for defining the bounds of the “program” for purposes of Title IX was the pervasive nature of the institution’s practices in which discrimination was found to exist. However, the court emphasized that its holding is not to be “construed as an implicit ruling that practices involving less crucial issues automatically fail to subject a university to Title IX’s sanctions,” and that its nonreliance on specific approaches is not to be taken as any indication of disapproval.<sup>163</sup> The *Iron Arrow* decision thus supports the principle announced by the appellate court in *Grove City*, that the means of enforcing Title IX must be as broad as the program benefitted.

2. *Programmatic Approach.*—Prior to the Supreme Court’s decision in *Grove City*, the principal case opposing the view that an institution may constitute a “program” under Title IX was *Hillsdale College v. Department of Health, Education and Welfare*.<sup>164</sup> In *Hillsdale*, the Sixth Circuit Court of Appeals held that the specific grant program and not the institution itself constituted the “program” pursuant to the statutory language of Title IX.<sup>165</sup> The *Hillsdale* court noted that Title IX originated in a floor amendment which did not include a “program-specific” limitation, and that no discussion or explanation was given for its appearance in the final version of the statute.<sup>166</sup> The court asserted that this change in language indicated a shift by Congress from an “institutional” to a “programmatically” approach.<sup>167</sup> It may be argued, however, that the “program-specific” limitation was inserted in Title IX for the same reasons that it was inserted in Title VI: to avoid the danger of wholesale funding cutoffs.<sup>168</sup>

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<sup>159</sup>702 F.2d at 562.

<sup>160</sup>*Id.* at 563.

<sup>161</sup>*Id.* at 564.

<sup>162</sup>*Id.* at 564-65.

<sup>163</sup>*Id.* at 564 n.27.

<sup>164</sup>696 F.2d 418 (6th Cir. 1982). *Hillsdale* was vacated for further consideration in light of the Supreme Court’s opinion in *Grove City*, 104 S. Ct. 1673 (1984).

<sup>165</sup>*Id.* at 430.

<sup>166</sup>*Id.* at 425-26.

<sup>167</sup>*Id.* at 426.

<sup>168</sup>See *supra* notes 30-31 and accompanying text.

The *Hillsdale* court attempted to distinguish *Bob Jones University v. Johnson*,<sup>169</sup> which articulated the “institutional” approach under Title VI, on two grounds. First, the court stated that *Bob Jones* involved an express finding of discrimination, while no allegation was made that *Hillsdale* had discriminated in any manner.<sup>170</sup> Second, the *Hillsdale* court asserted that the *Bob Jones* decision rested on a constitutional footing in addition to the statutory language of Title VI, while the *Hillsdale* case involved no constitutional issues.<sup>171</sup> The presence of a potential constitutional basis for the decision, however, does not lessen the potency of the statutory grounds.

Chief Judge Edwards offered a strong dissent to the *Hillsdale* majority’s narrow interpretation of “program,” noting Congress’ intention that Title IX be a powerful means of achieving equal rights for women.<sup>172</sup> Judge Edwards expressly endorsed the “institutional” approach set forth by the appellate court in *Grove City*, emphasizing that effective enforcement procedures are crucial to the achievement of the objectives for which Title IX was created.<sup>173</sup> He concluded, “Simple justice [and] recognition of Title IX’s basic and broad remedial purpose . . . dictate that I dissent from my colleagues’ disturbingly narrow interpretation of this remedial statute.”<sup>174</sup> Judge Edwards’ criticism may be applied to other decisions which read the “program-specific” limitation narrowly, without due recognition of the underlying policies of Title IX.<sup>175</sup>

Two principles may be gleaned from analysis of the relevant case law. First, HEW and those courts which have read “program” to include an institution, when the institution receives assistance, have correctly discerned the underlying policy of Title IX to prevent the use of any federal funds for the advancement of discrimination. Second, the enforcement power granted to federal agencies must be as extensive as the assistance received in order to effectuate that policy. Without this extensive enforcement power, Title IX sanctions for noncompliance are little more than empty threats. Unfortunately, the Supreme Court’s overly narrow interpretation of “program” in *Grove City* severely limits the intended remedial effect of Title IX upon sex discrimination in educational institutions.

### C. *Grove City: The Supreme Court Muddies The Waters*

The Supreme Court’s narrow interpretation of “program” in *Grove City*, limiting Title IX coverage to the college’s financial aid program

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<sup>169</sup>396 F. Supp. 597 (D. S.C. 1974). See *supra* notes 33-36 and accompanying text.

<sup>170</sup>696 F.2d at 429. The court recognized, however, that Title IX does not provide that funds may be cut off only upon a finding of actual discrimination. *Id.* at 430.

<sup>171</sup>*Id.* at 429.

<sup>172</sup>*Id.* at 431 (Edwards, C.J., dissenting).

<sup>173</sup>*Id.* at 436-37.

<sup>174</sup>*Id.* 437. Cf. cases cited *supra* note 67.

<sup>175</sup>See *supra* note 67.

even though the federal aid to students benefited the entire college, "may be superficially pleasing to those who are uncomfortable with federal intrusion into private educational institutions, but it has no relationship to the statutory scheme enacted by Congress."<sup>176</sup> The Court would have done far more to effectuate the intent of Congress had it refused to define the term "program" under Title IX, as it had done in *North Haven Board of Education v. Bell*.<sup>177</sup> Several aspects of the Court's decision in *Grove City* raise serious questions about the depth of the Court's analysis in reaching such a restrictive conclusion.

The Court observed first that had Grove City College taken part in the BEOG program through the Regular Disbursement System (RDS),<sup>178</sup> it would have "no doubt" that the "program" for Title IX purposes would not have been the college, but rather its financial aid program because the assistance would have been "earmarked" for the recipient's financial aid program.<sup>179</sup> The Court then reasoned that Grove City's participation in the Alternate Disbursement System (ADS)<sup>180</sup> required no different result because, although Grove City did not distribute students' awards, BEOG's clearly enlarged the resources that the college devoted to financial aid.<sup>181</sup>

Assuming, arguendo, that the Court is correct in its finding that the two disbursement systems are equivalent in effect under Title IX, the Court's statement that "the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institutionwide coverage"<sup>182</sup> is difficult to reconcile with its earlier broad interpretation of "recipient" which expressly included indirect recipients of federal monies.<sup>183</sup> It seems anomalous and inconsistent to "accord Title IX a sweep as broad as its language"<sup>184</sup> in defining "recipient" of federal assistance, while limiting the effect of Title IX's proscription of sex discrimination to the college's financial aid program, an entity which exists solely to disburse financial assistance within the institution. The college is then free, according to the Court's interpretation, to discriminate in its admissions, academic, or athletic programs without fear of Title IX sanctions, so long as it does not discriminate in its financial aid program. The "absurdity" of this result was aptly illustrated by Justice Brennan in his separate opinion:

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<sup>176</sup>*Grove City College v. Bell*, 104 S. Ct. 1211, 1226 (1984) (Brennan and Marshall, JJ., concurring in part and dissenting in part).

<sup>177</sup>See *supra* notes 53-71 and accompanying text.

<sup>178</sup>34 C.F.R. §§ 690.71, 690.78 (1983). The DSR program involves actual disbursement by the institution. See *supra* note 80.

<sup>179</sup>104 S. Ct. at 1220-21.

<sup>180</sup>*Id.* at 1221. See *supra* note 80.

<sup>181</sup>104 S. Ct. at 1221.

<sup>182</sup>*Id.*

<sup>183</sup>See *supra* notes 124-31 and accompanying text.

<sup>184</sup>104 S. Ct. at 1217.

The Court thus sanctions practices that Congress clearly could not have intended: for example, after today's decision, Grove City College would be free to segregate male and female students in classes run by its mathematics department. This would be so even though the affected students are attending the College with the financial assistance provided by federal funds. If anything about Title IX were ever certain, it is that discriminatory practices like the one just described were meant to be prohibited by the statute.<sup>185</sup>

The Court impliedly supported the termination of funding to an entire institution when federal assistance is "nonearmarked," as suggested by the court of appeals.<sup>186</sup> The Court, however, distinguished between nonearmarked aid and student financial aid programs, stating that the latter are "*sui generis*."<sup>187</sup> This unexplained conclusion contradicts the Court's earlier finding that Title IX "contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students."<sup>188</sup> The Court, therefore, offered no plausible justification for its asserted distinction.

The Court rejected the theory that funds received by students through the BEOG program "free up" the college's resources for other uses, suggesting that 1) no evidence was introduced in *Grove City* that federal assistance received by Grove City students resulted in the diversion of the institution's funds to other programs; and, 2) the assumption that Title IX applies to programs receiving an increased portion of an institution's resources as a result of federal aid to other programs within the institution is "inconsistent with the program-specific nature of the statute."<sup>189</sup> Regarding the first proposition, even the Court recognized that substantial portions of the BEOG assistance received by Grove City students ultimately found their way to the institution's general operating budget and were used to "provide a variety of services to the students through whom the funds pass."<sup>190</sup> As for the perceived inconsistency between the court of appeals' assumption and Title IX's program-specific nature, the Court focused upon the difficulty in determining which programs or activities receive indirect benefits from federal assistance earmarked for use elsewhere.<sup>191</sup> The Court did not refute the assertion that other programs received indirect benefits from aid to one specific program or activity, but stated only that it is extremely difficult to determine which programs to "police" under Title IX. The simple answer, and the answer which most effectively carries out the intent of Congress,

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<sup>185</sup>*Id.* at 1236 (Brennan and Marshall, JJ., concurring in part and dissenting in part).

<sup>186</sup>*See supra* notes 150-53 and accompanying text.

<sup>187</sup>104 S. Ct. at 1221.

<sup>188</sup>*Id.* at 1217.

<sup>189</sup>*Id.* at 1221.

<sup>190</sup>*Id.* at 1222.

<sup>191</sup>*Id.* at 1221.

is to expose the entire institution to Title IX coverage. The "Department's regulatory authority" need not "follow federally aided students from classroom to classroom"<sup>192</sup> because the institution has the necessary control over its individual programs to correct their actions or force compliance with Title IX. Yet, "policing" by the institution itself becomes less likely when a relatively small amount of assistance or exposure to sanctions is at stake.

The Supreme Court has repeatedly failed to recognize that termination of federal financial assistance to an entire institution is not the only sanction available for noncompliance with Title IX.<sup>193</sup> In many instances, the less severe remedies of injunctive and declaratory relief are preferable to the harsh results achieved through aid termination.<sup>194</sup> Ironically, the Court in *Grove City* appears to have been deeply concerned about providing an overbroad and intrusive definition of "program," yet the decision it reached had a devastating impact upon several students of Grove City College. Those students must have found cold comfort in the advice that they may take their aid and pursue an education elsewhere,<sup>195</sup> leaving Grove City College free to choose between the welfare of numerous students and compliance with a federal statute.

Justice Powell, joined by Justices Burger and O'Connor in a concurring opinion, lamented the *Grove City* decision as "an unedifying example of overzealousness on the part of the Federal Government."<sup>196</sup> Justice Powell noted the harsh effect that termination of assistance has upon student recipients of aid, and he emphasized that Grove City College had not discriminated in the slightest degree;<sup>197</sup> but even Justice Powell overlooked the possibility of sanctions other than termination of assistance as a more acceptable solution to the issues in *Grove City*.

## VII. APPLICATION OF TITLE IX SANCTION POWERS TO COMMON INCIDENTS OF NONCOMPLIANCE

Although the ambit of Title IX regulatory power should be as extensive as the assistance received directly or indirectly by recipient institutions, there may be circumstances where less drastic actions than funding termination will provide an adequate and more equitable means toward elimination of the noncompliance. This section addresses two recurrent situations under Title IX in which varied degrees of remedial measures are advised.

### A. *The Indirect Recipient*

Both direct and indirect recipients of federal assistance are subject

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<sup>192</sup>*Id.* at 1222.

<sup>193</sup>*See infra* notes 198-206 and accompanying text.

<sup>194</sup>*Id.*

<sup>195</sup>104 S. Ct. at 1223.

<sup>196</sup>*Id.* at 1223 (Powell, Burger and O'Connor, JJ., concurring).

<sup>197</sup>*Id.* at 1224.

to the full force of Title IX sanction efforts. The ultimate sanction of fund termination, however, has been misapplied in the case of the indirect recipient as the decision in *Grove City* demonstrates.<sup>198</sup> Quite frequently, the institution which is classified as a recipient because of federal aid received by its students receives no other direct aid from the government.<sup>199</sup> As a result, the student bears the brunt of the sanction by having her loan or grant withdrawn, while the institution, ostensibly the target of the sanction, has felt little of its impact. Of course, an institution whose students are unable to obtain federal aid may deem it necessary to provide some assistance from its own treasury in order to keep its enrollment at a maximum. However, the greatest and most immediate impact of the termination of assistance to the indirect recipient is clearly upon the student.

Despite its vigorous efforts to curb sex discrimination, HEW has overlooked the most efficacious means at its disposal to do so without erecting barriers to students' educational pursuits. Section 901 of Title IX provides that compliance with the statute "may be effected" by termination of funding or "by any other means authorized by law."<sup>200</sup> Adoption of the remedies of declaratory and, particularly, injunctive relief would be "authorized by law" and would be contained in the permissive grant of authority to fashion remedies.<sup>201</sup> Injunctive relief against an indirect recipient would be desirable because the discriminatory practices of the institution could be halted without adversely affecting the students who depend upon federal assistance to continue their education. The deterrent effect would then be focused upon the party that actually committed the wrong, the discriminatory institution. When an injunction is issued against an institution to cease its discriminatory practices, the "teeth" of this remedial measure are found in the contempt powers of the court. It is therefore unlikely that HEW would need to resort to a termination of assistance if injunctive relief were sought from the outset.

The Supreme Court, in *Cannon v. University of Chicago*,<sup>202</sup> observed in dictum that the funding termination sanction of Title IX can be severe in some instances. The Court noted the availability of alternative methods for ensuring compliance with Title IX.<sup>203</sup> The Supreme Court's observations in *Cannon* buttress the conclusion that "Congress intended the use of measures less severe than total fund cutoff where the statutory

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<sup>198</sup>See *supra* notes 192-96 and accompanying text.

<sup>199</sup>See *supra* note 79.

<sup>200</sup>20 U.S.C. § 1682.

<sup>201</sup>*Hillsdale College v. Department of Health, Educ. & Welfare*, 696 F.2d 418, 437 (6th Cir. 1982) (Edwards, C.J., dissenting).

<sup>202</sup>441 U.S. 677, 705 nn. 38 & 39 (1979).

<sup>203</sup>*Id.*

objectives of Title IX could be furthered by less heroic means.”<sup>204</sup>

HEW should continue its vigorous attack on the discriminatory activities of indirect recipients of federal aid, yet adopt an approach more rationally related to its objectives by seeking injunctive relief against noncomplying institutions prior to invoking the termination sanction. An amendment to its regulations to that effect, while not required, would reduce the tension that has built up between HEW and the private university.<sup>205</sup>

Institutions which desire to remain unregulated may provide loan or grant programs exclusive of the federal system. Those institutions which rely on federal student aid will be deemed indirect “recipients” of federal aid within the ambit of Title IX. The simplest advice to such institutions would be to comply with regulations and eliminate intra-scholastic discrimination policies in accordance with Title IX.

### *B. The Direct Recipient*

A different set of arguments pertains to the direct recipient of federal assistance which does not specifically earmark its funding for the particular discriminatory program within the institution.<sup>206</sup> While the termination sanction is certainly authorized and likely advised in many instances, there may be specific circumstances which would make the exercise of the “ultimate” sanction inequitable even in this situation. For example, State College may receive \$1,000,000.00 in federal grants for its building fund, which is subject to revocation upon the finding that the food services department in one dormitory has followed discriminatory hiring policies. Although State College will have the opportunity to correct its practices prior to the cutoff of any funds,<sup>207</sup> the disparate gravity of the offense and the remedy is alarming.

On the other hand, educational institutions generally exert substantial control over the operations policies of their subparts, and should be fully capable, therefore, of halting the discriminatory activity when given the opportunity to do so prior to a fund cutoff. Moreover, termination of funding to an institution receiving direct aid has a lesser impact upon the innocent student than termination of funding to an institution receiving only indirect aid. Where the institution receives direct aid, the effect of a fund cutoff is not limited to the students who were receiving

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<sup>204</sup>Hillsdale College v. Department of Health, Educ. & Welfare, 696 F.2d 418, 437 (6th Cir. 1982).

<sup>205</sup>See *Private Education Note*, *supra* note 42.

<sup>206</sup>E.g., *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

<sup>207</sup>20 U.S.C. § 1682 requires specific administrative processes prior to invocation of the termination sanction, including 1) the government's initial duty to attempt resolution of the violation through conciliation, 2) notice to the recipient of any adverse finding, 3) opportunity for hearing, 4) thirty days' advance notice to the congressional committees with responsibility for the laws under which the funds were provided, and 5) the right to judicial review of any decision to terminate funding.

federal aid, but instead is spread evenly across the student body when the institution is forced to raise tuition rates or other fees to account for lost revenues. Where the institution receives only indirect aid, the students receiving aid feel the sanction's impact when their federal aid is cut off completely.

HEW should terminate all assistance to the recipient institution only in those cases where the discriminatory program constitutes a substantial component of the institution or affects its operation to a significant degree. Where such action might create a gross injustice to the institution, or where the individual rights of innocent students are called into question, HEW should consider seriously the initial pursuit of injunctive relief against the noncomplying party.

#### VIII. THE PROPOSED CIVIL RIGHTS ACT OF 1984: AN OVERPOWERING RESPONSE TO *Grove City*

While the Supreme Court's broad construction of "recipient" under Title IX constituted an historic enlargement of federal control over educational institutions, its "program-specific" reading of the statute was seen as a setback for civil rights enforcement. Within hours of the Court's decision in *Grove City*, members of Congress had set out to restore Title IX to its proper dimensions.<sup>208</sup> As one commentator has suggested, however, "[t]he offending portion of the *Grove City* decision might . . . have been undone by a precisely drafted measure. . . . But Congress reached for a multi-warhead missile instead of a rifle."<sup>209</sup> Senate Bill 2568, introduced by Senator Kennedy on April 12, 1984, and its companion, H.R. 5490, are moving through Congress virtually unopposed. The potentially preemptive effect of this proposed legislation upon the precedents analyzed by this Note dictates at least a cursory examination of its possible effects upon Title IX and related legislation.

##### A. *The Impact of Grove City on Other Statutory Proscriptions of Discrimination*

The phrase "program or activity," upon which the Supreme Court based its "program-specific" limitation of Title IX, is also included in the statutes which proscribe discrimination on account of race, age, or handicap in federally assisted programs.<sup>210</sup> Therefore, it is likely that the Court's "program-specific" construction of Title IX will be applied to these similarly worded statutes.<sup>211</sup> An important distinction, however,

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<sup>208</sup>S. 2568, 98th Cong., 2nd Sess. (1984); H.R. 5490, 98th Cong., 2d Sess. (1984).

<sup>209</sup>Chester E. Finn, Jr., *Civil Rights in Newspeak*, Wall St. J., May 23, 1984, at 28, col. 1 (Chester Finn is a Professor of Education and Public Policy at Vanderbilt University).

<sup>210</sup>These statutes are the Age Discrimination Act of 1975 (42 U.S.C. §§ 6101-6107 (1982)); Section 504 of the Rehabilitation Act of 1973, as amended in 1978 (29 U.S.C. § 794); and Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d to 2000d-6).

<sup>211</sup>See, e.g., *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981); *Simpson v. Reynolds*

is that Title IX in its broadest form applies only to educational institutions, while "Title VI, Section 504, and the Age Discrimination Act cover all federally-assisted entities and programs."<sup>212</sup> A similarly narrow construction of those statutes would thus have an impact far exceeding the realm of education.

*B. The Intended Effect of the Civil Rights Act of 1984 on Title IX*

Senate Bill 2568 was introduced to restore Title IX and its companion statutes "to their intended force and coverage."<sup>213</sup> It would make three basic changes in the statutory language of Title IX: (1) The phrase "education program or activity" is replaced by "education recipient." Thus, Title IX would prohibit discrimination by an "education recipient of"—rather than "under a program or activity receiving"—federal financial assistance.<sup>214</sup> (2) A definition of the term "recipient" is added which would expand substantially the statutory reach of Title IX.<sup>215</sup> (3) The power of federal agencies to enforce Title IX through termination of funding is greatly enlarged.<sup>216</sup>

The result of these changes was aptly related by Senator Packwood as follows: "[A]ny recipient of Federal financial assistance will trigger institutionwide coverage. Lest any critic question our remedial approach, however, the bill will also clarify that only the particular assistance supporting noncompliance will be subject to termination."<sup>217</sup> Although the bill's sponsors claim that it was designed as a limited remedial measure and was not intended to "break new ground,"<sup>218</sup> such expectations may be shallow observations.

1. *The New "Recipient."*—Title IX now regulates "any education program or activity" receiving "Federal financial assistance."<sup>219</sup> Senate Bill 2568 would amend Title IX to cover any "educational recipient" of such aid. Assistant Attorney General William Bradford Reynolds has argued that the proposed Act does "break new ground," in that currently a Title IX "recipient" is regulated only to the extent of its programs

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*Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969); see also *Consolidated Rail Corp. v. Darrone*, 104 S. Ct. 1248 (1984).

<sup>212</sup>Testimony of Clarence M. Pendleton, Chairman of U.S. Commission on Civil Rights before House Committee on Judiciary and Education and Labor 4 (May 16, 1984).

<sup>213</sup>130 CONG. REC. S.4586, (daily ed. Apr. 12, 1984). Senator Dole, co-sponsor of S. 2568, queried "What difference does it make to a disabled student if the student financial aid office is in compliance with section 504, if none of the school's academic program are accessible?" 130 CONG. REC. S.4590, (daily ed. Apr. 12, 1984).

<sup>214</sup>130 CONG. REC. S.4594 (daily ed. Apr. 12, 1984) (statement of Senator Alan Cranston).

<sup>215</sup>S.2568, 98th Cong., 2d Sess. § 2(b)(2) (1984).

<sup>216</sup>*Id.* § 2(c)(2).

<sup>217</sup>130 CONG. REC. S.4589 (daily ed. Apr. 12, 1984).

<sup>218</sup>*Id.* at S.4590.

<sup>219</sup>20 U.S.C. § 1682 (1982).

or activities receiving assistance, while under S. 2568 "a 'recipient' is to be covered in its entirety."<sup>220</sup> It is the clear intent of the sponsors of S. 2568 that when an institution receives federal assistance for one of its parts or subunits, the institution and not the particular subunit would be the recipient.<sup>221</sup> The entire institution would be covered by Title IX if it receives support from the aided subunit.<sup>222</sup> Under the proposed Act, if one student at a college participated in the BEOG program, the entire college could be covered not only by Title IX, but also by Title VI, section 504, and the Age Discrimination Act.

2. *Expanded Enforcement Power of Title IX.*—Senate Bill 2568 retains all of the procedural safeguards currently embodied in Title IX.<sup>223</sup> According to existing law, federal agencies' power to terminate funding is limited to the particular program or activity which is found to be in noncompliance, and depends upon a judicial interpretation of the extent of the "program." Senate Bill 2568, however, would allow the agency to terminate any "assistance which supports"<sup>224</sup> the noncompliance, even though the supporting program is innocent. This aspect of the proposed Act presents dangerous potential for unrestrained termination of assistance in instances where other means of forcing compliance would be preferable.

It should be noted that alternatives are available which would achieve the limited objective of overturning the restrictive construction of "program" in *Grove City* without such an all-encompassing and somewhat Orwellian<sup>225</sup> legislative effort. A bill currently pending in the House, H.R. 5011, introduced by Congresswoman Schneider, would make Title IX coverage applicable to the educational institution as a whole in the event that any of its education programs or activities receive direct or indirect federal financial assistance.<sup>226</sup> Of course, as with any proscriptive

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<sup>220</sup>Testimony of William Bradford, Assistant Attorney General, Civil Rights Division, before the House Committee on Education and Labor 8 (May 22, 1984) [hereinafter referred to as Reynolds Testimony].

<sup>221</sup>130 CONG. REC. S.4586 (daily ed. Apr. 12, 1984) (statement of Senator Edward M. Kennedy). Senator Cranston explained S. 2568 as follows:

Where the Federal financial assistance is provided to an entity itself, either directly from a Federal agency or through a third party [sic], the whole entity and all of its component parts would be covered by the anti-discrimination ban and suit could be brought against the entity to enjoin discrimination in any of its components, and to recover damages for injuries suffered by reason of discrimination in any component.

*Id.* at S.4594.

<sup>222</sup>*Id.* "Support" is not defined by the proposed bill. *Id.* at S.4595.

<sup>223</sup>See *supra* note 206.

<sup>224</sup>S. 2568, 98th Cong., 2d Sess. § 2(c)(2)(C) (1984).

<sup>225</sup>Chester E. Finn, Jr., *Civil Rights in Newspeak*, Wall St. J., May 23, 1984, at 28, col. 1.

<sup>226</sup>H.R. 5011, 98th Cong., 2d Sess. (1984). See also Senator Packwood's proposal to amend Title IX by "striking out 'education program or activity' and inserting 'education program, activity, or institution.'" S. 2363, 98th Cong., 2d Sess. (1984).

legislation, the fairness of the terms of the bill may not always be consistent with the fairness of its application.

It is hoped that the Civil Rights Act of 1984 will be enacted only after it has been subjected to thorough review in both houses and has profited from the collective wisdom of the Congress.<sup>227</sup> Otherwise, Justice Powell and his associates may indeed be unwilling interpreters of an "unedifying example of overzealousness on the part of the Federal Government."<sup>228</sup>

## IX. CONCLUSION

The administrative power to terminate federal financial assistance to educational institutions under Title IX of the Education Amendments of 1972<sup>229</sup> has raised serious questions as to what parties are "recipients" of federal aid, and to what extent such recipients are subject to remedies for noncompliance with Title IX regulations.

The scope of Title IX was intended to be as extensive as the distribution of federal monies through the various federal agencies to educational institutions. A "recipient" within the meaning of the statute may be one directly receiving a federal check or one that benefits in some indirect manner from federal aid, such as a university whose students participate in federal loan or grant programs.

While the sanctions for noncompliance with Title IX regulations are subject to a "program-specific" limitation, these remedies, including termination of funding, must be applied in a manner which is as broad as necessary to achieve the objective of Title IX, to prevent the use of any federal monies to advance sex discrimination.

The ultimate sanction of a cutoff of funds can be harsh and it may damage the student rather than deter the noncomplying institution when the student is the only direct recipient of aid. Federal agencies should employ other means of enforcement authorized by Title IX, particularly injunctive relief, when the equities of the situation demand such actions. In many other instances, the termination sanction is a necessary vehicle for effectuation of the underlying policy objectives of Title IX.

WAYNE C. TURNER

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<sup>227</sup>See Reynolds Testimony, *supra* note 220, at 7.

<sup>228</sup>Grove City College v. Bell, 104 S. Ct. 1211, 1223 (1984) (Powell, Burger and O'Connor, JJ., concurring).

<sup>229</sup>20 U.S.C. §§ 1681-1686 (1982).











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